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1. No formal assignment of an account is necessary; any act showing an intent to transfer the party's interest is sufficient. *Smith* v. *Sterritt*, 260.

ACTION FOR POSSESSION OF REAL PROPERTY.

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ADMINISTRATION.

1. A sale of real estate belonging to an intestate's estate for the purpose merely of paying the costs of administration, no debts appearing ever to have been due from the intestate, is invalid, though approved by the probate court. *Farrar* v. *Dean*, 16.
2. The heirs of an intestate can not be joined as parties plaintiff with the administrator in a suit for the recovery of damages for the breach of a contract to convey land to such intestate. *Brueggeman* v. *Jurgensen*, 87.
3. The right of a widow to $200 worth of personal property under section 30 of article 2 of the administration act, (R. C. 1845, p. 77,) will pass by a deed of such widow relinquishing to the administrator of her deceased husband's estate all her "right, title and interest of *dower* in said estate;" and that without reference to the question whether there is or is not a consideration for the assignment. *McFarland* v. *Baze's Adm'r*, 156.
4. Where proceedings are instituted in a circuit court, under section 31 of the act concerning wills (R. C. 1845, p. 1083), to invalidate a will, and vacate the probate thereof; *held*, that the executor who obtained the probate of such will, and who, for aught that appears, is still acting under the will whose validity is contested, is estopped to move to dismiss such proceedings upon the alleged ground that the contested paper had never been lawfully established as the will of the testator, in that the judge before whom the will was proved had not power to take proof thereof in vacation. *Potter* v. *Adams' Exec'r*, 159.

ADMINISTRATION—(*Continued.*)

5. Proceedings under section 31 of the act concerning wills to invalidate a will, of which proof had been taken in vacation by the judge of the probate court of Green county, are not premature by reason of having been commenced before the court in term had confirmed such contested will. *Ib.*
6. A judgment of foreclosure and that the mortgaged premises be sold, &c., obtained in a proceeding under the act concerning mortgages (R. C. 1845, p. 749), may be revived in the name of the administrator of the mortgagee against the administrator of the mortgagor; and that too, although this judgment of foreclosure was obtained by the mortgagee as trustee of a third person. *Riley's Adm'r* v. *McCord's Adm'r*, 265.
7. An illegality in the grant of letters of administration can not be taken advantage of in a collateral proceeding. *Ib.*
8. A petition to a probate court by an administrator for a sale of lands for the payment of debts should not be dismissed for want of an averment that the lands mentioned in the petition belonged to the intestate at the time of his death. *Trent's Adm'r* v. *Trent*, 307.
9. The fact that a demand against an intestate's estate is made out against the intestate himself instead of against his estate, or the administrator, will not justify a refusal to hear evidence in support of such demand. *Coots* v. *Morgan's Adm'r*, 522.
10. No motion for a review or a new trial is necessary where a court improperly refuses to hear any evidence at all in support of a demand against an intestate's estate. *Ib.*
11. Section 38 of the act concerning wills (R. C. 1845, p. 1084,) renders the appointment of an executor void where he is also one of two attesting witnesses; consequently he is a competent witness to prove the will. *Murphy* v. *Murphy*, 526.
12. Although an appointment of an executor would be rendered void by reason of the fact that such appointee is also one of two attesting witnesses, he may be appointed administrator with the will annexed. *Murphy* v. *Murphy*, 526.
13. Where a notice is given to an administrator that a demand will be presented for allowance against the intestate's estate "at the next term of the county court of and for N. M. county, to be holden in the town of N. M., in said county and state, on the 8th day of May, 1854," the demand may be presented and allowed on the 9th day of May; if so presented and allowed, the administrator being present, the circuit court should not dismiss the cause on appeal on the ground that the demand was not presented on the 8th of May. *Phillips* v. *Russell's Adm'r*, 527.
14. Although an administrator, wishing to make a final settlement, should suffer himself to be charged with the receipt of a debt due the estate, which had never been paid, and a judgment should be rendered against him for a balance found due upon such settlement, he may afterwards in his character of administrator sue for and recover the said debt. *Shore's Adm'r* v. *Coons*, 553.

ADMINISTRATION—(*Continued.*)

15. Although an administrator should be released by a probate court from liability for an inventoried debt on the ground that it had been improperly inventoried, this can not be set up as a bar to an action brought by the administrator for the debt. *Ib.*

ADVERSE POSSESSION.

See OUSTER.

AGENT.

See PRINCIPAL AND AGENT.

AGISTER.

1. An agister of cattle can not be rendered liable for the loss of a horse committed to his charge upon the mere proof of the loss of the horse; negligence must be shown. *Rey* v. *Toney*, 600.

AGREEMENT.

See BETTING; HUSBAND AND WIFE; GUARANTY; SPECIFIC PERFORMANCE; PLEADING, 2; CONVEYANCE.

1. A., B. and C. entered into a tripartite agreement under seal, whereby it was covenanted that a pork-house should be built upon a certain lot recited thein, to be held by C. under a lease from one D.—B. to erect the said pork-house—A. to advance to B. $1000—C. to advance $3000 to B., and to surrender to B. all liens and securities held against him by C. except his (said C.'s) titles, liens and security to and upon said lot and certain other specified lots—C. to make a lease of said pork-house, when completed, to A. for a term of two years at the annual rent of $2000; the amount of $1000 advanced by A. to be credited to him for the first half year's rent—the rents to accrue upon said pork-house, and a hemp warehouse upon the same lot, to be paid to C., to be applied by him in the payment of the ground rent, insurance, taxes, &c.; the remainder to be applied in extinguishing the debt due, or to become due, from B. to C.—C. to keep the buildings leased and producing rent—C., whenever he should be paid all debts due from B., to assign to B. the lease from D. or any renewal thereof. *Held*, that a failure to complete the building would not give to A. a cause of action against C.; nor could A. treat the money advanced by him to B. as money advanced upon the credit of C. *Clarkson* v. *Morrison's Administrator*, 134.
2. A person authorized by a railroad company to collect calls made upon subscriptions of stock, and entitled to receive as compensation a certain rate per cent. of the amount collected, would not be entitled to charge such commissions for receiving and delivering to the treasurer of the company bonds of a city and county with which, in lieu of money, said city and county were allowed to pay the calls on their subscriptions of stock. *Lakenan* v. *Hannibal & St. Joseph Railroad Company*, 505.
3. Mere proposals preliminary to a contract form no part thereof unless incorporated into it. *Hunt* v. *Johnston*, 509.

ALIEN.

1. The real estate of an alien escheats to the state at his death. *Farrar* v. *Dean*, 16.

AMENDMENT.

See PRACTICE, 12, 19, 29.

APPEAL.

1. Where a suit is commenced before a justice of the peace to enforce a claim for work and labor against a contractor, also a lien against the building, and the suit as against the owner of the building is commenced out of time, and no judgment is rendered by the justice in regard to the enforcement of the lien; *held*, that the St. Louis Law Commissioner's Court has jurisdiction of an appeal taken in such case by the contractor from a judgment rendered against him by the justice. *Kinnear* v. *Jones*, 83.
2. Where a party appealing from a justice of the peace to the St. Louis Land Court fails to pay the jury fee and file the transcript, the court may, upon the appellee's filing a transcript and paying the fee, affirm the judgment of the justice. *Harley* v. *McCauliff*, 85.
3. An appeal will lie from the decision of a justice of the peace on an interplea concerning property or effects garnished by virtue of an execution. *Smith* v. *Sterritt*, 260.
4. *Quere*, whether an appeal will lie from the proceedings of the county court under the act of March 3, 1851, to provide for, and laying out roads, &c. (Sess. Acts, 1851, p. 274.) *Walker* v. *Likens*, 298.
5. The practice act of 1849 did not change the rules of practice regulating proceedings upon appeals from justices of the peace. *Coffman* v. *Harrison*, 524.

ARBITRATION.

1. Where a party to a submission to arbitration failed to attend upon the arbitrators at the time and place appointed for the hearing of the matters submitted; *held*, that it was not error to refuse to vacate the award made upon a motion made under section 9 of the act concerning arbitrations, (R. C. 1845, p. 121,) the ground of which was that the failure to attend at the hearing was unavoidable by reason of the obstruction of the roads, caused by the rise of the water courses. *Shroyer* v. *Barkley*, 346.

ASSESSMENT.

See ROADS.

ASSIGNEE.

See PLEADING, 2, 4, 5 6, 10.

ASSIGNMENT.

1. No formal assignment of an account is necessary; any act showing an intent to transfer the party's interest is sufficient. *Smith* v. *Sterritt*, 260.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See FRAUD AND FRAUDULENT CONVEYANCES.

1. The omission of an assignee, in the case of a voluntary assignment for the benefit of creditors, under the act concerning voluntary assignments (R. C. 1845, p. 127), to file an inventory, give security, or to discharge any other duty imposed by said act, can not destroy the rights of the creditors under the assignment. *Hardcastle* v. *Fischer*, 70.
2. Although it may be attempted by an assignment for the benefit of creditors to secure one or more fictitious and fraudulent claims, neither the assignee nor the other creditors being cognizant of the fraud, this will not render the assignment ineffectual in favor of such other creditors; the assignment will in such case be held void as against the fraudulent claimant, and good in favor of the honest creditors. *Ib.*
3. The effect of impeaching such a claim by reason of fraud is that the share of the fund, that would otherwise be appropriated to its payment, sinks into the residue for the benefit of those creditors who are entitled to the residue by the terms of the deed of assignment; an attaching creditor, who summons the trustees as garnishees, can not be allowed to stand in the place of the excluded claimant and take his share of the fund. *Ib.*
4. An assignment of a stock of goods to a trustee for the benefit of a creditor provided that the grantor, until default, should have the use of the property conveyed for the ordinary and legitimate purposes of trade, and should enjoy the same unmolested, provided, however, that he, the grantor, should faithfully apply the proceeds of the sales of the goods, wares, &c., towards replenishing and keeping up the stock to its state at the time of the assignment; and that all goods, wares and merchandise thus acquired after the assignment, should be considered bound for the payment of the debt secured; *held*, that the assignment was void upon its face, as a matter of law, as against creditors. (Brooks v. Wimer, 20 Mo. 503, affirmed.) *Walter* v. *Wimer*, 63.
5. An assignment of a stock of goods to a trustee for the benefit of certain designated creditors which provides that the grantor shall be allowed to remain in the possession of the property assigned, and to sell and dispose of the same in the usual course of business until default, is void upon its face as a matter of law as against creditors. (Brooks v. Wimer, 20 Mo. 503; Walter v. Wimer, ante, p. 63, affirmed.) *Martin* v. *Maddox*, 575.
6. Such a deed of assignment will be held valid as against creditors who have assented to and affirmed it. *Ib.*
7. A deed of assignment of a stock of goods to a trustee for the benefit of certain designated creditors, which provides that the grantor shall be allowed to remain in the possession of the property assigned, and to sell and dispose of the same in the usual course of business, being void upon its face as a matter of law as against creditors, will not be made good, as against a creditor who has not assented thereto, by a subsequent deed of the grantor relinquishing to the trustee all the rights

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ASSIGNMENT FOR THE BENEFIT OF CREDITORS—(*Continued.*)

and privileges reserved to the grantor by the above provision, and providing that the trustee "may, at any time when he shall see fit, seize and take possession of the said property or any part thereof, wherever he may find the same." *Martin* v. *Rice & Maddox*, 581.

ATTACHMENT.

1. A judgment against a garnishee in an attachment will not protect him against a subsequent recovery in favor of one who had, previously to the garnishment, taken an assignment of the debt from the defendant in the attachment. *Funkhouser* v. *How*, 44.
2. Where a garnishee, having notice of an assignment by the defendant in the attachment, fails to set up this matter as a defence to the garnishment, and a judgment is rendered against him, and he pays over the money to the attaching creditor; *held*, that the assignee is not entitled to recover the amount so paid from such attaching creditor, although such creditor had notice of the assignment during the pendency of the garnishment. *Ib.*
3. *Quere*, whether a garnishee who fails to set up in his answer, as a defence to the garnishment, the fact of a previous assignment of the debt by the defendant in the attachment, for the reason that he had no notice of such assignment, is entitled to relief against a judgment against himself for the debt in favor of the plaintiff in the attachment. *Marmaduke* v. *McMasters*, 51.
4. Where in an attachment suit against the payee of a note, who had previously assigned the same, the maker thereof was garnished, and judgment obtained against him, and payment enforced: *held*, that the assignee was not entitled to recover from the plaintiff in the attachment the sum so paid. *Dickey* v. *Fox*, 217.
5. An appeal will lie from the decision of a justice of the peace on an interplea concerning property or effects garnished by virtue of an execution. *Smith* v. *Sterritt*, 260.
6. An assignee of an account, assigned for value previous to a garnishment by virtue of an execution against the assignor, has a superior right to the plaintiff in the execution, although the assignee may not have given notice of the assignment previous to the garnishment. *Ib.*
7. The voluntary dismissal of an attachment suit, commenced by an endorsee of a promissory note at the request of a surety on said note against the principal, in which suit an amount of property more than sufficient to satisfy the debt was attached, will discharge the surety. *Bank of Missouri* v. *Matson*, 333.

AUCTIONEERS.

1. Tobacco, the growth of this state, is not one of the articles exempt from duty under the act to license auctioneers. (R. C. 1845, p. 161.) *The State* v. *Rucker*, 557.
2. A person may be guilty, under the act to license auctioneers, (R. C. 1845, p. 162,) of exercising a trade or business of a public auctioneer without a license, although he may receive no compensation for the act of selling. *Ib.*

B

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See ATTACHMENT, 4; PLEADING, 4.

1. The drawer of a bill of exchange is liable, in case of its dishonor, according to the law of the place where the bill is drawn. *Price* v. *Page & Bacon*, 65.
2. A. executed a promissory note to B. and C., who endorsed the same, and the same was transferred to D.; A. at the same time executed a deed of trust to B. and C., to secure them against their liability upon said note. The trustee, under the deed of trust, took possession of the trust property, and the proceeds of the sale of the same were more than sufficient to pay the promissory note. They were not however applied to the payment thereof. *Held*, that whether D. had knowledge of the proceedings under the deed of trust or not, the liability of C. to D. was not thereby discharged. *Fisher* v. *Meyer's Adm'x*, 91.
3. Where a bill is drawn by a partnership firm in favor of a creditor of such firm upon another firm, and is accepted in the name of the firm drawn upon by a partner thereof, who is also a member of the drawing firm, it can not be inferred from these facts alone that the purpose of the parties, or that the effect of the transaction is to subject the funds of the accepting firm to the payment of the debt: these facts alone appearing, a member of the firm drawn upon, although he may not be a member of the drawing firm and may not have assented to the acceptance, will not thereby be exonerated from liability on the acceptance. The acceptance *prima facie* is on partnership account. *Tutt* v. *Adams*, 186.
4. A due bill signed thus: "A., agent for B.," will bind A. if he had no authority to bind B. *Coffman* v. *Harrison*, 524.
5. A promissory note was executed in the following form: "Two years after date, I promise to pay to the order of Tevis, Sons & Co., $4000, for value received, with interest as per agreement from date. [Signed] Henry L. Tevis;" this note was assigned in the name of Tevis, Sons & Co. *Held*, in a suit by the assignee against the members of the firm of Tevis, Sons & Co., in which the defence relied on was that Henry L. Tevis, the maker of the note, was a member of the partnership firm of Tevis, Sons & Co., and had executed the note in question and endorsed it in the name of the firm for the purpose of raising money for his individual use; that it was erroneous to instruct the jury that "the form of the note sued on imports that Henry L. Tevis was the principal debtor, and that Tevis, Sons & Co. were his sureties." *Tevis* v. *Tevis*, 535.
6. To entitle the holder of a dishonored bill of exchange to the damages allowed by the statute, it must be expressed to be "for value received." *Hallowell* v. *Page*, 590.
7. Notice of the dishonor of a bill of exchange given to one member of a partnership firm is notice to all. *Bouldin* v. *Page & Bacon*, 594.

BILLS OF EXCHANGE AND PROMISSORY NOTES—(*Continued.*)

8. In the case of a dishonor of a bill of exchange, the damages in a suit against the drawers are regulated by the law of the place where the bill is drawn. *Page* v. *Page & Bacon*, 595.
9. Certificates of deposit are not within section 7 of the act concerning bills of exchange (R. C. 1845, p. 173); consequently no damages are allowable thereon by said act in case of non-payment. *Sawyer* v. *Page*, 595.

BETTING.

See CRIMES AND PUNISHMENTS.

1. Where a note is given to secure money bet in this state on the election of a President of the United States, and a surety on said note, who knew at the time of signing the consideration for which it was given, is compelled by legal process in a foreign jurisdiction to pay the same: *held*, that he is not entitled to contribution from his principal. *Harley* v. *Stapleton's Adm'r*, 248.

BOATS AND VESSELS.

See TORT, 1.

1. Where a steamboat has been seized under the act concerning boats and vessels, (R. C. 1845, p. 180,) and, upon the execution of a bond under the ninth section of said act with approved security, is discharged from further detention, the boat is entirely discharged from the lien; after such discharge of the boat, and after proceedings have been commenced in another court to enforce liens against the boat, the lien can not be revived by obtaining an order for further security, and to retake the boat until further security be given, and by the court's rescinding its approval of the bond; the demand would not in such case become entitled to be allowed and classed as a lien against the boat in such other proceedings. *Carson* v. *Steamboat Elephant*, 27.
2. The master of a steamboat will be liable, under section 31 of the act concerning slaves (R. C. 1845, p. 1018), for transporting a slave from one place to another in this state without the consent of the owner, although he may not be aware of the fact of such slave being on board the boat, unless he use proper care to guard against such an occurrence. *Withers* v. *Steamboat El Paso*, 204.
3. The degree of care required of the master in such case is not "the strictest diligence," but such care as thoughtful and prudent men engaged in affairs equally hazardous to their own rights of property would take in order to protect themselves from loss and injury. *Ib.*
4. The deposition of a master of a steamboat, which had been seized under the act concerning boats and vessels for the transportation by the master thereof of a slave from one place to another in this state without the consent of the owner, and released upon the giving of a bond by the master with security, under the ninth section of said act, is inadmissible in evidence in favor of the master and his securities. Admissions and declarations made by the master are admissible in such case in evidence against him. *Ib.*

BONA FIDE PURCHASER.

See SALE, 3.

BOND.

See OFFICIAL BOND; CONVEYANCE; CONSTABLE.

1. In an action on a penal bond with collateral condition a recovery can not be had beyond the penalty. *Farrar* v. *Christy's Adm'r*, 453.

BROKER.

See PRINCIPAL AND AGENT.

C

CARE.

1. The master of a steamboat will be liable, under section 31 of the act concerning slaves (R. C. 1845, p. 1018), for transporting a slave from one place to another in this state without the consent of the owner, although he may not be aware of the fact of such slave being on board the boat, unless he use proper care to guard against such an occurrence. *Withers* v. *Steamboat El Paso*, 204.
2. The degree of care required of the master in such case is not "the strictest diligence," but such care as thoughtful and prudent men engaged in affairs equally hazardous to their own rights of property would take in order to protect themselves from loss and injury. *Ib.*
3. An agister of cattle can not be rendered liable for the loss of a horse committed to his charge upon the mere proof of the loss of the horse; negligence must be shown. *Rey* v. *Toney*, 600.

CATTLE.

See CRIMES AND PUNISHMENTS, 12.

CERTIFICATE OF DEPOSIT.

1. Certificates of deposit are not within section 7 of the act concerning bills of exchange (R. C. 1845, p. 173); consequently no damages are allowable thereon by said act in case of non-payment. *Sawyer* v. *Page*, 595.

CHANGE OF VENUE.

See CRIMES AND PUNISHMENTS, 19.

1. The fact that the affidavit accompanying a petition for a change of venue may have been defective, will not render the order changing the venue a nullity; nor should the court to which the cause is transferred dismiss the suit for this defect. The objection should be made at the time the petition for a change of venue is acted upon. *Potter* v. *Adams' Executors*, 159.

CHARTER.

See CITY OF ST. LOUIS.

CHURCH PROPERTY.

1. Church property in the city of St. Louis was liable, under the sewerage act of March 12, 1849, (Sess. Acts, 1849, p. 519,) to be assessed for the construction of sewers. *Lockwood* v. *City of St. Louis*, 20.

CITY OF ST. LOUIS.

See LANDS AND LAND TITLES, 5.

1. The city of St. Louis was empowered by its charter of March 3, 1851, to prohibit the keeping open of stores, shops, and other places of business on Sunday; those transgressing the provisions of the fourth section of article two of the ordinance concerning misdemeanors (Rev. Ordinances, 1853, p. 514) are amenable to the penalties prescribed by said ordinance. *City of St. Louis* v. *Cafferata*, 94.

COMMON.

See LANDS AND LAND TITLES, 1.

CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

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CONFIRMATIONS.

See LANDS AND LAND TITLES.

CONFLICT OF LAWS.

See BETTING; DESCENTS AND DISTRIBUTIONS, 2; DAMAGES, 16.

CONSIDERATION.

See GIFT.

1. Where it appears that at the time of a sale of an improvement upon the public lands the vendor was out of possession, and that the land had been previously entered by a third person, the vendee in an action for the price may set up these facts as showing a want of consideration. *Burns* v. *Hayden*, 215.

CONSTABLE.

1. Where money is collected by a constable on an execution, interest on the same at the rate of one hundred per cent. per annum can not, in a case of delinquency, be recovered against him or his securities from the time of a demand made previous to the return day of the execution, but only from such return day. *The State, to use, &c.*, v. *Mutr & Ritter*, 263.
2. Interest at the rate of one hundred per cent. can be recovered of the securities of a constable, in a suit on the bond of such constable. *Ib.*
3. Such suit may be instituted after the expiration of the term of office of the constable; and is properly cognizable in a justice's court. Ib.

CONSTITUTIONAL LAW.

1. A deposition of a witness, taken upon the preliminary examination before a committing magistrate in the presence of the accused, may be received in evidence on the trial upon proof of the death of such witness. (RYLAND, Judge, dissentiag.) *The State* v. *McO'Blenis*, 402. *The State* v. *Baker*, 437.
2. The provision of the constitution of this State declaring "that in all criminal prosecutions the accused has the right to meet the witnesses against him face to face" does not render such evidence illegal. (RYLAND, Judge, dissenting.) *Ib.*

CONSTRUCTION.

See CONVEYANCE; AGREEMENT; GIFT.

CONTINUANCE.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 2.

CONTRACT.

See AGREEMENT.

CONTRIBUTION.

1. Where a note is given to secure money bet in this state on the election of a President of the United States, and a surety on said note, who knew at the time of signing the consideration for which it was given, is compelled by legal process in a foreign jurisdiction to pay the same: *held*, that he is not entitled to contribution from his principal. *Harley* v. *Stapleton's Adm'r*, 248.

CONVEYANCE.

See FRAUD AND FRAUDULENT CONVEYANCE, 1; GIFT.

1. By a deed of gift certain slaves were conveyed to M. W., a daughter of the grantor, "to the said M. W., and to her bodily issue, and no way else, &c., to have and to hold unto the said M. W. and her bodily issue forever, &c., though with this condition, and such is the express meaning and intent of this instrument, that the above named negro slaves are to remain with and be kept in the possession of the said Mary White for and during her natural life; and after her death, the said negro slaves, with their increase, to be equally divided between the heirs and issue of the body of the said M. W., any thing to the contrary herein contained notwithstanding." *Held*, that this deed created a life interest only in M. W., the daughter of the grantor, with a remainder to her children. *Hayden's Adm'r* v. *Stinson*, 182.
2. A deed of gift of certain negroes, after reciting that the donor had long since had it in contemplation to give said negroes to his daughter, to be *entailed* upon her and her heirs, proceeded as follows: "Now, therefore, know ye that in consideration of the natural love and affection that I entertain and feel for my daughter Susan M. Kerr, and in consideration of the more surely providing for her and her children a permanent property, I do hereby grant and bestow of my free gratuity, and for and in consideration as above expressed, to my said daughter Susan M. Kerr, and to heirs, separately and exclusively from all claim and interest of her husband, John K. Kerr, my negro woman Ellen and her infant child, and my negro woman Sarah, now and for some time past in the possession of John K. Kerr by permission, and to this end, only the more securely and effectually to obtain that object, I do thereby, for the consideration and to the end aforesaid, convey said negroes, Ellen and her child and Sarah, to Francis P. Peneston, in trust to hold the same for the sole and exclusive use and benefit of my dughter Susan M. Kerr, and to her heirs forever," &c. *Held*, that the legal ownership of such slaves vested by virtue of said deed in Francis P. Peneston; that he held in trust for the exclusive benefit of Mrs. Kerr, to the exclusion of her husband. *Blue* v. *Peneston*, 240.
3. The title to a slave may be transfered by deed without actual delivery. *Lawrence* v. *Lawrence's Executors*, 269.

CONVEYANCE—(*Continued.*)

4. A. conveyed by deed and delivered a slave to B. in trust to appropriate the hire of the slave during the life of A. to his, A.'s benefit, the slave to be delivered by B., upon the death of A., to C., a son of A. *Held*, that C. acquired an interest under this conveyance that could not be destroyed by any arrangement entered into between A. and B.; that A. could not, as against C., and without his consent, resume the entire ownership of the slave. *Ib.*
5. William Christy, being seized in fee of four lots in the city of St. Louis, by deed dated September, 1832—his wife Martha T. joining in the conveyance—conveyed the same to their two sons Edmund T. and Howard F. Christy; the lots were conveyed by separate metes and bounds, two lots to Edmund and two to Howard. The deed contained the following habendum: "to have and to hold the premises aforesaid with all the appurtenances thereunto belonging to them and their heirs forever, upon condition that should either of the grantees herein named die without leaving legal heirs of their body, the survivor shall inherit the whole of the property hereby conveyed; and should both grantees die without leaving legal heirs as aforesaid, the property hereby conveyed shall revert to the other legal heirs of the said William and Martha T." Edmund T. Christy died in the year 1840, without leaving heirs of his body, he having never been married. After the death of Edmund, the heirs of William and Martha T. Christy, by deed dated October 7th, 1842, released to Howard F. Christy all their "right, title, interest, estate and expectancy" in and to the said four lots; this deed of release contained the following recital: "which lots of land were held to said Edmund T. and Howard F., in the manner specified in said deed, with cross remainder to the survivor, and also on a certain contingency with remainder to the heirs general of said William Christy and Martha T. Christy," &c. Howard F. Christy executed a bond of even date with the above release in the penal sum of $3000 to James T. Sweringen and Martha his wife—the said Martha being one of the heirs of William and Martha T. Christy; the said bond contained the following condition: "The condition of the above obligation is such, that whereas, &c., [reciting the conveyance of September 20th, 1832,] and whereas, upon the happening of certain contingencies in said deed mentioned and contained, the said property, lots and parcels of ground therein specified would by the terms of said deed revert and belong to the heirs of the said grantors in said deed, of whom the said Martha, wife of James T. Sweringen, is one; and whereas the said James T. Sweringen and Martha his wife have, by their deed made jointly with certain other heirs of the said William Christy and wife, executed to the said Howard F. Christy a release and quit claim of all such right, title, interest, estate and expectancy in and to said property, as they would have been entitled to by virtue of the first mentioned deed upon the happening of said contingencies, had not said release been executed: Now, if the contingency in the first deed mentioned shall happen, whereby the said obligees or their heirs would

CONVEYANCE—(*Continued.*)

have been entitled by virtue of said first mentioned deed to said property, or any part thereof, or any interest in the same, had not said release been executed, and the said Howard F. Christy, his heirs, executors or administrators shall well and truly pay to the said James T. Sweringen and Martha his wife, their heirs, executors, &c., the value at the time of happening of said contingency of the portion, part or interest which the said Sweringen and wife, their heirs, executors or administrators would have been entitled to in said property in said first deed described by virtue of said deed, had not the said release been executed, then this obligation shall be void; otherwise shall remain in full force and virtue." Howard F. Christy died in the year 1853, leaving a widow but no heirs of the body. *Held,* in a suit against Howard F. Christy's administrators to recover the value of the interest in said four lots (alleged to be one-sixth) that would have vested, but for the above release, in Mrs. Sweringen at the death of Howard without leaving heirs of his body: 1st. That, construing the deed of September 20th, 1832, with reference to the rules of the common law, Edmund T. Christy and Howard F. Christy would have each become seized in fee tail of the two lots granted to each respectively. 2d. That, by the operation of the act of February 14, 1825, (R. C. 1825, p. 216,) the estates tail that would have vested, but for said act, in Edmund and Howard respectively, were cut down and destroyed, Edmund taking a life estate only in the two conveyed to him, and Howard a life estate only in the two lots conveyed to him; that a remainder in Edmund's two lots immediately passed in fee simple absolute to Howard (subject, however, to be divested by the birth of issue of Edmund); that a remainder in Howard's two lots passed in fee simple absolute to Edmund (subject to be divested by the birth of issue of Howard); that the remainder in Howard's two lots, which vested in fee simple absolute in Edmund, descended upon his (Edmund's) death to his heirs general, of whom Mrs. Sweringen was one. 3d. That consequently there was a good cause of action on said bond, inasmuch as the release above mentioned was effectual to transfer to Howard F. Christy an interest that had vested in Mrs. Sweringen in two of the four lots embraced in the deed of September 20, 1832. 4th. That defendants were not estopped to deny that Mrs. Sweringen took an interest in said lots under the limitations of the deed of September 20, 1832. 5th. That no recovery could be had beyond the penalty of the bond. *Farrar* v. *Christy's Admr.*, 453.

6. Where a minor executes a deed of conveyance of land, and after attaining majority conveys the same land to a third person, the second deed is a disaffirmance of the first. This is a question of law, and should not be submitted to a jury. *Peterson* v. *Laik*, 541.
7. Calls for boundaries may be controlled by other words of description in a deed. *McCune* v. *Hull*, 570.

CORPORATIONS.

1. The city of St. Louis was empowered by its charter of March 3, 1851,

CORPORATIONS—(*Continued.*)

to prohibit the keeping open of stores, shops, and other places of business on Sunday; those transgressing the provisions of the fourth section of article two of the ordinance concerning misdemeanors (Rev. Ord. 1853, p. 514) are amenable to the penalties prescribed by said ordinance. *City of St. Louis* v. *Cafferata*, 94.

2. Where work and labor are performed upon, or materials furnished for, the construction of bridges and culverts upon the line of a public railroad authorized by an act of the state legislature, no lien upon said bridges and culverts is conferred upon the material man or laborer by the act of February 24th, 1843, (Sess. Acts, 1843, p. 83,) "for the better security of mechanics and others erecting buildings, or furnishing materials for the same, in the city and county of St. Louis." *Dunn* v. *North Missouri Railroad Co.*, 493.
3. A laborer employed in the construction of a railroad by a sub-contractor is entitled to the benefit of the 12th section of the "Act to authorize the formation of railroad associations and to regulate the same," approved February 24, 1853. (Sess. Acts, 1853, p. 128.) *Peters* v. *St. Louis & Iron Mountain Railroad Co.*, 586.
4. It is not necessary that the thirty days' labor, for which a railroad company may be held liable under said act, should be performed upon thirty consecutive days. *Ib.*

CREDITORS.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; FRAUD, 4; FRAUDULENT CONVEYANCES.

CRIMES AND PUNISHMENTS.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES; LICENSE.

1. Where the circumstances of a homicide show *beyond all question* that it was committed by lying in wait, (it being assumed by the prosecution and by the accused that the only question for determination is, whether the accused committed the homicide,) it is not error to refrain from instructing the jury as to the law of murder in the first and second degrees. *The State* v. *Byrne*, 151.
2. The owner of a slave can not be rendered liable under section 35 of article 9 of the Act concerning Crimes and Punishments for the loss of a horse belonging to plaintiff, where the offence charged against the slave is the burning of the stable in which the horse happened to be at the time of the fire. *Stratton* v. *Harriman*, 324.
3. An indictment under section 27 of article 8 of the act concerning crimes and punishments (R. C. 1845, p. 404,) may be good, although the sum bet on the result of the election may not be stated therein. *The State* v. *Bridges, Paris & Smith*, 353.
4. An indictment under said section charged in the same count A. and B. with betting on the result of an election, and C. with becoming stakeholder of said bet; *held*, that the indictment was defective, said offences being distinct and separate offences. *Ib.*
5. An indictment under section 27 of article 8 of the act concerning

CRIMES AND PUNISHMENTS—(*Continued.*)

crimes and punishments (R. C. 1845, p. 404), charging A. and B. with betting on the result of an election, is good, although it be not expressly charged that they bet with each other. *The State* v. *Smith & Nicholas*, 356.

6. Time and place should be stated in an indictment with certainty. An indictment which, after stating several different times, charges that the defendant "then and there" committed the offence, &c., is bad for uncertainty. *The State* v. *Hayes*, 358.
7. An indictment was in the following form: "The grand jurors for the State of Missouri, for the body of Putnam county, sworn, upon their oaths present, that B. E. G., late of Putnam county aforesaid, on the first day of October, in the year 1855, at the county aforesaid, did then and there unlawfully buy a certain commodity, to-wit, five deer skins, then and there of the value of five dollars, of a certain slave, called John," &c. *Held*, that a venue was properly laid to the commission of the offence. *The State* v. *Goode*, 361.
8. An indictment charging the defendant—one M. A.—with selling "intoxing liquors in a quantity [ ] than one quart, to-wit, one-half pint of whisky, of the value, &c., and one-half pint of brandy, of the value, &c., to one T. W. C.," &c. "without the said M. A. then and there first taking out and having a license as a dram-shop keeper, according to law, or any other lawful authority, contrary," &c., is sufficient. The word "less" having been omitted, the averment under the videlicet becomes material, and must be proved as laid. *The State* v. *Arbogast*, 363.
9. In an indictment for obstructing and resisting a constable in the execution of process—a writ of execution which is set forth in the indictment—it is not necessary to allege that a judgment was rendered upon which said writ of execution issued. *The State* v. *Dickerson*, 365.
10. An indictment founded on section 34 of article 2 of the act concerning Crimes and Punishments (R. C. 1845, p. 350), charging an assault with a loaded gun, with intent to kill, will not be rendered defective by an omission to state therein the manner of the assault or the mode in which the gun was used, or attempted to be used. *The State* v. *Chandler*, 371.
11. An indictment for an assault upon one J. C., with intent to kill, charging that J. G., the defendant, "with a certain gun, then and there loaded with gunpowder and divers leaden balls, which said gun he, the said J. G., then and there had and held in his hands, to, against and upon the said J. C., and then and there did unlawfully, feloniously, on purpose, and of his malice aforethought, the said gun did cock, raise and present, with the intent then and there unlawfully, feloniously, and of his malice aforethought, the said J. C. to shoot and kill; and that the said J. G. would have executed his said purpose and intent had he not been prevented and intercepted from so doing, contrary," &c., is sufficient. *The State* v. *Greenhalgh*, 373.
12. Mares are *cattle* within section 57 of article 3 of the act concerning

CRIMES AND PUNISHMENTS—(*Continued.*)

Crimes and Punishments. (R. C. 1845, p. 364.) *The State* v. *Clifton*, 376.

13. It is not necessary that an indictment, founded on section 34 of article 8 of the act concerning Crimes and Punishments, for keeping open a grocery on Sunday, should contain the negative allegation that the grocery was not kept open for the sale of drugs, medicines, provisions, or other articles of necessity. *The State* v. *Sutton*, 377.
14. An indictment under section 17 of article 8 of the act concerning Crimes and Punishments, charging that the defendant did on, &c., &c., "unlawfully bet a sum of money, to-wit, fifty cents, at and upon a game of chance, played with and by means of half dollars and cracks in the floor of a house, which said half dollars and cracks was then and there a gambling device, adapted, devised and designed for the purpose of playing games of chance for money and property," is sufficient. *The State* v. *Flack*, 378.
15. An indictment, under section 57 of article 3 of the act concerning Crimes and Punishments (R. C. 1845, p. 364), against a negro slave for maliciously killing a mare, must charge the act to have been done "feloniously." *The State* v. *Gilbert* (*a slave*), 380.
16. Although the failure of the foreman of a grand jury to certify under his hand an indictment to be a true bill is no cause for arrest of judgment after a trial and conviction, it is ground for quashing the indictment before trial. *The State* v. *Burgess*, 381.
17. Under the revised code of 1855, where two defendants, jointly indicted, elect to be tried together, they are not entitled to a panel of more than thirty-six jurors. *The State* v. *Phillips & Ross*, 475.
18. A., B. and C. were jointly indicted for the murder of one D.—A. as principal in the first degree, B. and C. as aiders and abettors; A. was put upon his trial first and was acquitted: *held*, that as against B. and C. the question of the guilt or innocence of A. was still open; that his acquittal did not operate their discharge; that, though A. was the actual perpetrator of the homicide, the record of his acquittal would be inadmissible in evidence in favor of B. and C. *Ib.*
19. The proceedings upon an application for a change of venue in a criminal case, and the order of the court granting the same, are inadmissible in evidence against the accused. *Ib.*
20. Where evidence introduced is competent as against one of two defendants and incompetent as against the other, the party as against whom it is incompetent should, on the failure of the court of its own motion to instruct the jury as to its application and effect, move the court so to instruct; if the court refuse to grant such motion, it is error; if no such motion be made, there is no error. *Ib.*
21. The interval between the perpetration of a homicide and the flight of the perpetrator may be so short that there can arise no well grounded apprehension of personal violence: in such case evidence of excitement existing at the time of the arrest is incompetent, and may be properly

CRIMES AND PUNISHMENTS—(*Continued.*)
ruled out when offered to repel any presumption of guilt arising from the fact of the flight. *Ib.*

22. Where the defence, for the purpose of discrediting a witness for the prosecution, causes to be read certain portions of depositions of such witness taken before the coroner on the inquest and before the committing magistrate, the prosecution may then read the whole of such depositions. *Ib.*
23. A., B. and C. were jointly indicted for the murder of D.—A. as principal in the first degree, the actual perpetrator—B. and C. as aiders and abettors. A. was put upon his trial first and acquitted; upon the trial of B. and C. the court, after instructing the jury as to the law of murder in the first degree, gave the following instruction: "If the jury believe from the evidence that A. wilfully shot and killed the deceased without premeditation or without the intention to consummate by his act the death of the deceased, and that B. and C. were then and there present aiding, abetting and assisting A. to do the aforesaid act, without premeditation or malice aforethought on their part, then you will find the defendants guilty of murder in the second degree, and assess their punishment," &c. *Held*, that this instruction was misleading and erroneous *Ib.*
24. In an indictment under the act to license and tax merchants, (R. C. 1845, p. 737,) for dealing as a merchant without a license, it is not necessary to state the name of the person to whom, or the price for which, the merchandise was sold. *The State* v. *Miller*, 532.

D

DAMAGES.
See JUDGMENT, 4; TORT; ROADS.

1. The drawer of a bill of exchange is liable, in case of its dishoner, according to the law of the place where the bill is drawn. *Price* v. *Page & Bacon*, 65.
2. A mortgagee wrongfully disposed of the mortgaged premises; *held*, in a suit against him by the mortgagor, that the measure of damages was properly assumed to be the value of the premises sold at the time of the sale, the circumstances of the case not calling for the exercise of any rigor. *Wilson* v. *Drumrite*, 304.
3. Where in an action for entering plaintiff's land and cutting down and carrying away his trees, a verdict is rendered in favor of the plaintiff in the following form: "We the jury find for the plaintiff forty-three dollars and thirty-three cents:" *held*, that it is error to render judgment, under section first of the act concerning certain trespasses, (R. C. 1845, p. 1068,) for treble the sum so found in favor of plaintiff. *Herron* v. *Hornback*, 492.
4. Coffman v. Huck, 19 Mo. 435, affirmed. *Coffman* v. *Huck*, 496.
5. To entitle the holder of a dishonored bill of exchange to the damage allowed by the statute, it must be expressed to be "for value received." *Hallowell* v. *Page*, 595.

DAMAGES—(*Continued.*)

6. In the case of a dishonor of a bill of exchange, the damages in a suit against the drawers are regulated by the law of the place where the bill is drawn. *Page* v. *Page & Bacon*, 593.
7. Certificates of deposit are not within section 7 of the act concerning bills of exchange (R. C. 1845, p. 173); consequently no damages are allowable thereon by said act in case of non-payment. *Sawyer* v. *Page*, 595.

DEED.

See CONVEYANCE.

DEED OF TRUST.

See FRAUD AND FRAUDULENT CONVEYANCES.

DELIVERY.

1. The title to a slave may be transferred by deed without actual delivery. *Lawrence* v. *Lawrence's Executrix*, 269.

DEMAND.

1. Where the taker up of a mare as a stray acquires no right by such taking, he having no right under the stray law to take such mare up as a stray, a demand is not necessary to enable the owner to sue for her conversion. *Ray* v. *Davison*, 280.

DESCENTS AND DISTRIBUTIONS.

1. The real estate of an alien escheats to the state at his death. *Farrar* v. *Dean*, 16.
2. A, in the year 1784, died intestate in the state of Virginia, possessed of certain slaves, leaving a widow and two children—B., a daughter, and C., a son—him surviving; certain of the slaves were allotted to the widow as dower slaves, and remained in her possession until her death in the year 1816; B., the daughter, married and died before her mother in the year 1812, leaving D., her husband, and several children her surviving. In 1816, after the death of the widow of A., proceedings for a partition of the dower slaves were instituted by C. against the children of B.; in the suit in partition D. appeared and acted as guardian *ad litem* for his children, and, an allotment having been made to D.'s children, he took possession of the slaves so allotted, and afterwards brought them to the state of Missouri. *Held*, 1st, that D., by acting as guardian *ad litem* for his children in the suit in partition, did not become a party to such suit in such sense that he would be concluded by the judgment rendered in behalf of his children, nor would he be estopped thereby to controvert the title of his children; 2d, that by the law of the state of Virginia said slaves, upon the death of A., in the year 1784, *descended* to and vested in his heirs—B. and C.—subject to the widow's dower; that the interest so vested in B. passed to D., her husband, and not to her children. *Terrill* v. *Boulware*, 254.

DILIGENCE.

See CARE.

DISAFFIRMANCE.

See INFANCY, 7.

DEPOSITIONS.

See EVIDENCE, 5, 8, 15, 19.

1. Depositions to prove a will rejected by a probate court may, in a proceeding to establish the will, instituted in the circuit court under section 31 of the act concerning wills, be taken under the general law concerning depositions. *Cawthorn* v. *Haynes*, 236.

DOWER.

1. The right of a widow to $200 worth of personal property under section 30 of article 2 of the administration act, (R. C. 1845, p. 77,) will pass by a deed of such widow relinquishing to the administrator of her deceased husband's estate all her "right, title and interest of *dower* in said estate;" and that without reference to the question whether there is or is not a consideration for the assignment. *McFarland* v. *Baze's Adm'r*, 156.

DRAM-SHOP KEEPER.

See LICENSE.

1. A person may, since the act of March 12, 1849, (Sess. Acts, 1849, p. 54,) be indicted for selling intoxicating liquors, as a dram-shop keeper, without a license, in any quantity less than ten gallons. *The State* v. *Slate*, 530.

E

EJECTMENT.

1. A judgment for damages in an action in the nature of an action of ejectment, although for a merely nominal sum, is a bar to a recovery, in a subsequent suit, of rents received prior to such judgment. *Stewart* v. *Dent*, 111.
2. Where in an action in the nature of an action of ejectment the defendant in his answer denies the co-tenancy alleged by plaintiff, no stronger evidence of an ouster will be required of plaintiff than in a case where no co-tenancy exists. *Peterson* v. *Latk*, 541.
3. Where a plaintiff in ejectment shows that whatever title the defendant may have had has passed by mesne conveyances to himself, it is not competent for the defendant to set up an outstanding title in a third person. *Mathews* v. *Lecompte*, 545.

ELECTION.

See FORCIBLE ENTRY AND DETAINER, 1.

EQUITY.

See INJUNCTION; LANDLORD AND TENANT, 1; FRAUD AND FRAUDULENT CONVEYANCES, 4, 5.

1. Although the courts will not interfere by injunction to restrain the sale personal property levied upon and advertised to be sold for the payment of taxes illegally assessed; yet, it seems, they will so interfere

EQUITY—(*Continued.*)

where it is sought to enjoin the sale of real property. (Deane v. Todd, 22 Mo. 91, explained.) *Lockwood* v. *City of St. Louis*, 20.

2. Where equitable relief is sought, the petition should be framed with a view to such relief. *Vasquez* v. *Ewing*, 31.
3. There is no equity for specific performance of a contract to convey land where the party against whom such equity is asserted has rendered a specific execution on his part impossible by conveying said land to a third person. *Brueggeman* v. *Jurgensen*, 87.
4. The doctrine of marketable titles is a purely equitable doctrine. *Kent & Obear* v. *Allen*, 98.

ESCHEAT.

1. The real estate of an alien escheats to the state at his death. *Farrar* v. *Dean*, 16.

ESTOPPEL.

See PRACTICE, 3; PARTITION, 4, 5; CONVEYANCE, 5.

1. Where one of several tenants in common is in possession of a tract of land, and a judgment for the possession of the tract is rendered against him in behalf of one claiming by title adverse to that of the co-tenants, and a writ for the delivery of possession is issued and placed in the hands of the proper officer; *held*, that this amounts to such an ouster as will terminate the co-tenancy in favor of the plaintiff in the execution, who, without an actual execution of the writ of possession, receives a deed from the defendant in the execution; he will not be estopped by accepting such a conveyance to deny the title of the co-tenants of his grantor; nor will the acceptance of such deed be such a recognition of a title, recited therein to have been acquired by the grantor, as will amount to an estoppel. *Vasquez* v. *Ewing*, 31.
2. Where proceedings are instituted in a circuit court, under section 31 of the act concerning wills (R. C. 1845, p. 1083), to invalidate a will, and vacate the probate thereof; *held*, that the executor who obtained the probate of such will, and who, for aught that appears, is still acting under the will whose validity is contested, is estopped to move to dismiss such proceedings upon the alleged ground that the contested paper had never been lawfully established as the will of the testator, in that the judge before whom the will was proved had not power to take proof thereof in vacation. *Potter* v. *Adams' Exec'rs*, 159.
3. A., in the year 1784, died intestate in the state of Virginia, possessed of certain slaves, leaving a widow and two children—B., a daughter, and C., a son—him surviving; certain of the slaves were allotted to the widow as dower slaves, and remained in her possession until her death in the year 1816; B., the daughter, married and died before her mother in the year 1812, leaving D., her husband, and several children her surviving. In 1816, after the death of the widow of A., proceedings for a partition of the dower slaves were instituted by C. against the children of B.; in the suit in partition D. appeared and acted as guardian *ad litem* for his children, and, an allotment having been made

ESTOPPEL—(*Continued.*)

to D.'s children, he took possession of the slaves so allotted, and afterwards brought them to the state of Missouri. *Held*, 1st, that D., by acting as guardian *ad litem* for his children in the suit in partition, did not become a party to such suit in such sense that he would be concluded by the judgment rendered in behalf of his children, nor would he be estopped thereby to controvert the title of his children; 2d, that by the law of the state of Virginia said slaves, upon the death of A., in the year 1784, *descended* to and vested in his heirs—B. and C.—subject to the widow's dower; that the interest so vested in B. passed to D., her husband, and not to her children. *Terrill* v. *Boulware*, 254.

EVIDENCE.

See WILLS, 9.

1. The *opinion* of a surveyor as to the proper *location* of a concession or grant, is inadmissible in evidence to determine such location. *Blumenthal* v. *Roll*, 113.
2. A superintendent of water-works in the city of St. Louis, appointed and acting under the city ordinance No. 2288, (R. Ord. 1850, p. 160,) received from the city register blank water-licenses, with the respective amounts stated therein, to be issued by him to individuals from whom it was his duty to collect, and pay over to the city treasurer the sums called for in such licenses; *held*, that *prima facie* he became chargeable with the whole amount called for by the blank licenses so received by him, although the city auditor, not having received from the city register one of the duplicate receipts which it was the duty of the register to have required of the superintendent for the blank licenses delivered, had not charged said licenses to the superintendent as required by the above mentioned ordinance. *City of St. Louis* v. *Foster*, 141.
3. In an action on an official bond against the principal and sureties, the admissions of the principal, made after the expiration of his term of office, are inadmissible in evidence against the sureties. *Ib.*
4. If an assignment describes the obligations assigned as the "within notes," parol evidence is admissible to show that the instrument sued on, being an obligation under seal, was folded up and enclosed within the paper upon which the assignment was made, and thus delivered to the assignee. *Thornton* v. *Crowther*, 164.
5. The deposition of a master of a steamboat, which had been seized under the act concerning boats and vessels for the transportation by the master thereof of a slave from one place to another in this state without the consent of the owner, and released upon the giving of a bond by the master with security, under the ninth section of said act, is inadmissible in evidence in favor of the master and his securities. Admissions and declarations made by the master are admissible in such case in evidence against him. *Withers* v. *Steamboat El Paso*, 204.
6. Although declarations of a party in possession of property against his

EVIDENCE—(*Continued.*)

interest are admissible in interest against one claiming under him, they must, to be competent evidence, be made prior to the inception of the successor's title. *Cavin* v. *Smith & Kerr*, 221.

7. Where it is sought to invalidate a will on the ground that the alleged testator was under undue influence, and was at the time of the signing the will of unsound mind by reason of intoxication, declarations made by him to the effect that he had never made the will—that if he had signed it they had got him drunk and made him do it, for he had no recollection of it—are inadmissible in evidence. *Gibson* v. *Gibson*, 227.
8. Depositions to prove a will rejected by a probate court may, in a proceeding to establish the will, instituted in the circuit court under section 31 of the act concerning wills, be taken under the general law concerning depositions. *Cawthorn* v. *Haynes*, 236.
9. Declarations, made by a testator at times before the date of the will that it is sought to invalidate, that the persons mentioned in the will as legatees "should never have any of his property," as also declarations made on divers occasions after such date, that "he had no will," alone and unsupported by other facts, do not furnish any legal evidence whatever of incapacity on the part of such testator, or of undue influence, and are inadmissible in evidence. *Ib.*
10. A notice given under the provisions of the revised code of 1845, (see R. C. 1845, p. 998, § 1,) by one who had executed a promissory note as a security to the person having the right of action thereon, to commence suit forthwith against the other parties to the note, naming them, is sufficient. *Christy's Adm'r* v. *Horne*, 242.
11. Although no notice may have been given to produce such instrument, evidence may be given of its contents. *Ib.*
12. In a suit upon a promissory note against A., B. and C., C. defended upon the ground that he was merely a security for A. and B., and had given notice to the plaintiff to commence suit forthwith against A. and B., which plaintiff had not done—C. examined the plaintiff upon interrogatories under the fifth section of the twenty-fourth article of the practice act of 1849 (Sess. Acts, 1849, p. 98). By one of these interrogatories, plaintiff was asked to state who was principal upon said note and who securities. In answer to this interrogatory, plaintiff stated that C. was principal, "for the reason that said note was given to secure the payment of the purchase money for a certain tract of land sold by said Christy, (plaintiff's intestate,) in his lifetime, to said C., &c." *Held*, that the reason thus assigned did not amount to *new matter* within section ninth of said article. *Ib.*
13. An offer to pay money by way of compromise is no evidence of indebtedness on the part of him making the offer. *Dillon* v. *Wilson*, 278.
14. *Held*, in a suit brought by A. against B. for wrongfully seizing and selling under an execution against C. certain horses alleged to have belonged to plaintiff as having been purchased for her by C. as her

EVIDENCE—(*Continued.*)

agent, that declarations made by C. in making the purchases to the effect that he was purchasing the horses for himself were admissible in evidence, together with evidence of the insolvency of C. at the time of said purchases, to show that the alleged agency was but a cloak to cover the fraud of C. *McNeeley*, v. *Hunton*, 281.

15. A. instituted a suit against B. to recover money paid by him as a security for said B. upon a promissory note executed by them jointly. A. afterwards instituted a suit against C., charging in his petition that at the time of the execution of said promissory note C. was a secret partner of B. and praying that the two suits might be consolidated. C. answered denying the alleged partnership. The court consolidated the two suits against the objection of C. *Held*, 1st, that this consolidation was irregular; 2d, that depositions taken in the suit against B. alone, and of the taking of which C. had no notice, were inadmissible in evidence against C. *Peery* v. *Moore*, 285.

16. Where a deed executed and attested in the state of Tennessee, the grantor and the attesting witnesses residing there at the same time, is offered in evidence in the courts of this state, its execution may be proved by proof of the handwriting of the grantor. It will be presumed that the subscribing witnesses are out of the jurisdiction of the courts of this state. *Clardy* v. *Richardson*, 295.

17. A copy of the record in the state of Tennessee of such deed is inadmissible in evidence in the courts of this state, unless it appear that such copies are evidence by the laws of Tennessee. *Ib.*

18. The allowance by a justice of the peace of an appeal from a judgment by default raises no presumption that an application had been previously made by the party aggrieved to set aside the default. *Burns' Adm'r* v. *Hunten*, 337.

19. A deposition of a witness, taken upon the preliminary examination before a committing magistrate in the presence of the accused, may be received in evidence on the trial upon proof of the death of such witness. (RYLAND, Judge, dissenting.) *The State* v. *McO'Blenis*, 402. *The State* v. *Baker*, 437.

20. The provision of the constitution of this State declaring "that in all criminal prosecutions the accused has the right to meet the witnesses against him face to face" does not render such evidence illegal. (RYLAND, Judge, dissenting.) *Ib.*

21. A., B. and C. were jointly indicted for the murder of one D.—A. as principal in the first degree, B. and C. as aiders and abettors; A. was put upon his trial first and was acquitted: *held*, that as against B. and C. the question of the guilt or innocence of A. was still open; that his acquittal did not operate their discharge; that, though A. was the actual perpetrator of the homicide, the record of his acquittal would be inadmissible in evidence in favor of B. and C. *The State* v. *Phillips & Ross*, 475.

22. The proceedings upon an application for a change of venue in a crim-

EVIDENCE—(*Continued.*)

inal case, and the order of the court granting the same, are inadmissible in evidence against the accused. *Ib.*

23. Where evidence introduced is competent as against one of two defendants and incompetent as against the other, the party as against whom it is incompetent should, on the failure of the court of its own motion to instruct the jury as to its application and effect, move the court so to instruct; if the court refuse to grant such motion, it is error; if no such motion be made, there is no error. *Ib.*
24. The interval between the perpetration of a homicide and the flight of the perpetrator may be so short that there can arise no well grounded apprehension of personal violence: in such case evidence of excitement existing at the time of the arrest is incompetent, and may be properly ruled out when offered to repel any presumption of guilt arising from the fact of the flight. *Ib.*
25. Where the defence, for the purpose of discrediting a witness for the prosecution, causes to be read certain portions of depositions of such witness taken before the coroner on the inquest and before the committing magistrate, the prosecution may then read the whole of such depositions. *Ib.*
26. Where a father, upon the marriage of his daughter, delivers to her and his son-in-law a slave, and the slave remains in possession of the son-in-law for six years or longer, these are circumstances from which a jury may well find a gift of the slave to the daughter and son-in-law. *Jones* v. *Briscoe*, 498.
27. Section 38 of the act concerning wills (R. C. 1845, p. 1084,) renders the appointment of an executor void where he is also one of two attesting witnesses; consequently he is a competent witness to prove the will. *Murphy* v. *Murphy*, 526.
28. Where a minor sues by his next friend, the next friend is a competent witness in behalf of such minor plaintiff. *Ib.*
29. Objections to the admission of testimony should be specific, not general. *Mathews* v. *Lecompte*, 545.
30. Where a plaintiff in ejectment shows that whatever title the defendant may have had has passed by mesne conveyances to himself, it is not competent for the defendant to set up an outstanding title in a third person. *Ib.*
31. A petition alleged that the plaintiff and defendant "jointly leased" certain premises of one A., and that the defendant collected the rents and failed to account to plaintiff for his share, one-half, of said rents. Upon the trial plaintiff offered in evidence a lease of said premises from a third person to said A. and an *assignment* by A. to plaintiff and defendant. *Held*, that this was a variance, and that the court might properly refuse to receive the *assignment* in evidence unless the plaintiff would amend his petition so as to correspond with the proof. *Detckman* v. *McCormick*, 596.
32. An agister of cattle can not be rendered liable for the loss of a horse

EVIDENCE—(*Continued.*)

committed to his charge upon the mere proof of the loss of the horse; negligence must be shown. *Rey* v. *Toney*, 600.

EXECUTION.

See CONSTABLE.

1. An appeal will lie from the decision of a justice of the peace on an interplea concerning property or effects garnished by virtue of an execution. *Smith* v. *Sterritt*, 260.
2. An assignee of an account, assigned for value previous to a garnishment by virtue of an execution against the assignor, has a superior right to the plaintiff in the execution, although the assignee may not have given notice of the assignment previous to the garnishment. *Smith* v. *Sterritt*, 260.

EXECUTORS.

See ADMINISTRATION.

F

FACTOR.

See PRINCIPAL AND AGENT.

1. Where one acting as a factor receives merchandise for shipment to a particular consignee, and makes advances upon the same, and the merchandise, being refused by the consignee by reason of its being in a damaged condition, is sold for less than the sum advanced; *held*, that the factor is entitled to have his advances made good. *Bull* v. *Stigerson*, 53.

FATHER.

See PARENT AND CHILD.

FINDING OF THE FACTS.

See PRACTICE, 7, 21, 22; REFEREE.

FORCIBLE ENTRY AND DETAINER.

1. A., having leased certain premises to B., leased the same to C., and upon the termination of B.'s lease demanded possession thereof, which being refused, he brought an action of unlawful detainer against B.; *held*, it not appearing that C. had made his election to sue his landlord, A., for the non-delivery of the premises leased, or to bring ejectment against B., the first lessee, that an action for unlawful detainer would not lie. (LEONARD, J., dissenting.) *L'Hussier* v. *Zallee*, 12.
2. A tenant may maintain an action of forcible entry and detainer against his landlord, although at the time of the said entry the tenant may have been holding over after the determination of his term. *Krevet* v. *Meyer*, 117.

FORECLOSURE.

See MORTGAGE.

FRAUDULENT CONCEALMENT.

See FRAUD AND FRAUDULENT CONVEYANCES, 7.

FRAUD AND FRAUDULENT CONVEYANCES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2; STATUTE OF FRAUDS.

1. An assignment of a stock of goods to a trustee for the benefit of a creditor provided that the grantor, until default, should have the use of the property conveyed for the ordinary and legitimate purposes of trade, and should enjoy the same unmolested, provided, however, that he, the grantor, should faithfully apply the proceeds of the sales of the goods, wares, &c., towards replenishing and keeping up the stock to its state at the time of the assignment; and that all goods, wares and merchandise thus acquired after the assignment, should be considered bound for the payment of the debt secured; *held*, that the assignment was void upon its face, as a matter of law, as against creditors. (Brooks v. Wimer, 20 Mo. 503, affirmed.) *Walter* v. *Wimer*, 63.
2. Although it may be attempted by an assignment for the benefit of creditors to secure one or more fictitious and fraudulent claims, neither the assignee nor the other creditors being cognizant of the fraud, this will not render the assignment ineffectual in favor of such other creditors; the assignment will in such case be held void as against the fraudulent claimant, and good in favor of the honest creditors. *Ib.*
3. The effect of impeaching such a claim by reason of fraud is that the share of the fund, that would otherwise be appropriated to its payment, sinks into the residue for the benefit of those creditors who are entitled to the residue by the terms of the deed of assignment; an attaching creditor, who summons the trustees as garnishees, can not be allowed to stand in the place of the excluded claimant and take his share of the fund. *Ib.*
4. Where a party purchasing land causes the legal title to be placed in a third person with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of such creditors, and this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors; and the purchaser may then, in a proceeding instituted for that purpose, and upon proving the alleged fraud, have a decree vesting the legal title in himself, and for the possession of the land, and an account of the rents that may have accrued since his purchase. *Dunntca* v. *Coy*, 167.
5. Before, however, he can become entitled to such relief, the title acquired by him at the execution sale must be perfected by the execution of the sheriff's deed. *Ib.*
6. A. executed a deed of gift of a slave to B. with a reservation to the donor during her lifetime of "the use and benefit of the labor" of the slave—the donee to take possession at the death of the donor; *held*, that this deed, being unrecorded and unaccompanied with possession in the donee, was void, under section four of the act concerning fraudulent conveyances, (R. C. 1845, p. 526,) as against a subsequent purchaser from A., though with notice. (SCOTT, J., dissenting, holding that said section contemplated a deed of gift of an interest to take effect presently in possession in the donee.) *Layson* v. *Rogers*, 192.

FRAUD AND FRAUDULENT CONVEYANCES—(*Continued.*)

7. If the vendor of a horse is aware, at the time of the sale, of the existence of a latent defect, unknown to the vendee, of such a character that the vendee would not have made the sale had he known of it, and such as would have ordinarily escaped the observation of men engaged in buying horses, and he allows the vendee to purchase without disclosing the defect, he is guilty of a fraudulent concealment, and must respond in damages to the vendee. *McAdams* v. *Cates*, 223.
8. *Held*, in a suit bronght by A. against B. for wrongfully seizing and selling under an execution against C. certain horses alleged to have belonged to plaintiff as having been purchased for her by C. as her agent, that declarations made by C. in making the purchases to the effect that he was purchasing the horses for himself were admissible in evidence, together with evidence of the insolvency of C. at the time of said purchases, to show that the alleged agency was but a cloak to cover the fraud of C. *McNeeley* v. *Hunton*, 281.
9. Fraud in the consideration of a promissory note secured by a deed of trust, will not affect the title of one who purchases *bona fide* at a sale by the trustee under the deed of trust. *Mathews* v. *Lecompte*, 545.
10. An assignment of a stock of goods to a trustee for the benefit of certain designated creditors which provides that the grantor shall be allowed to remain in the possession of the property assigned, and to sell and dispose of the same in the usual course of business until default, is void upon its face as a matter of law as against creditors. (Brooks v. Wimer, 20 Mo. 503; Walter v. Wimer, ante, p. 63, affirmed.) *Martin* v. *Maddox*, 575.
11. Such a deed of assignment will be held valid as against creditors who have assented to and affirmed it. *Ib.*
12. A deed of assignment of a stock of goods to a trustee for the benefit of certain designated creditors, which provides that the grantor shall be allowed to remain in the possession of the property assigned, and to sell and dispose of the same in the usual course of business, being void upon its face as a matter of law as against creditors, will not be made good, as against a creditor who has not assented thereto, by a subsequent deed of the grantor relinquishing to the trustee all the rights and privileges reserved to the grantor by the above provision, and providing that the trustee "may, at any time when he shall see fit, seize and take possession of the said property or any part thereof, wherever he may find the same." *Martin* v. *Rice & Maddox*, 581.

G

GARNISHMENT.

See ATTACHMENT.

GIFT.

See CONVEYANCE.

1. The right of a widow to $200 worth of personal property under section 30 of article 2 of the administration act, (R. C. 1845, p. 77,) will pass

GIFT—(*Continued.*)

by a deed of such widow relinquishing to the administrator of her deceased husband's estate all her "right, title and interest of *dower* in said estate;" and that without reference to the question whether there is or is not a consideration for the assignment. *McFarland* v. *Baze's Adm'r.*, 156.

2. Where a father, upon the marriage of his daughter, delivers to her and his son-in-law a slave, and the slave remains in possession of the son-in-law for six years or longer, these are circumstances from which a jury may well find a gift of the slave to the daughter and son-in-law. *Jones* v. *Briscoe*, 498.

GUARDIAN.

See PRACTICE, 17.

GUARDIAN AD LITEM.

See PLEADING, 7; EVIDENCE, 28.

1. A., in the year 1784, died intestate in the state of Virginia, possessed of certain slaves, leaving a widow and two children—B., a daughter, and C., a son—him surviving; certain of the slaves were allotted to the widow as dower slaves, and remained in her possession until her death in the year 1816; B., the daughter, married and died before her mother in the year 1812, leaving D., her husband, and several children her surviving. In 1816, after the death of the widow of A., proceedings for a partition of the dower slaves were instituted by C. against the children of B.; in this suit in partition D. appeared and acted as guardian *ad litem* for his children, and, an allotment having been made to D.'s children, he took possession of the slaves so allotted, and afterwards brought them to the state of Missouri. *Held*, 1st, that D., by acting as guardian *ad litem* for his children in the suit in partition, did not become a party to such suit in such sense that he would be concluded by the judgment rendered in behalf of his children, nor would he be estopped thereby to controvert the title of his children; 2d, that by the law of the state of Virginia said slaves, upon the death of A., in the year 1784, *descended* to and vested in his heirs—B. and C.—subject to the widow's dower; that the interest so vested in B. passed to D., her husband, and not to her children. *Terrill* v. *Boulware*, 254.

GUARANTY.

1. A pork packer engaged to examine, salt, brine, repack, and brand a lot of meat, and to "guarantee New Orleans inspection;" *held*, this agreement amounted to a guaranty that the pork should pass inspection in New Orleans *as branded* by the packer. *Warren* v. *Palmer*, 78.

H

HUNT'S CERTIFICATES.

See LANDS AND LAND TITLES, 1.

HUSBAND AND WIFE.

1. Where husband and wife, after their marriage, abandon the possession of premises occupied by the wife previous to her marriage free of

HUSBAND AND WIFE—(*Continued.*)

rent, and upon which she had a growing crop at the time of her marriage, and, after such abandonment of the premises and crop, the husband converts to his own use the crop, he will not thereby be rendered liable for the *rent* of the premises. *Dillon* v. *Wilson*, 278.

2. A testamentary disposition by a husband, of either real or personal property, to his wife, to be void upon her marrying again, is not against public policy, but is a valid disposition under the law of this state. *Dumey* v. *Schoeffler*, 170.
3. A will contained the following provision: "I give and bequeath unto my wife, Sarah, the whole of my estate, both personal and real, during her life or widowhood; but if my wife should again marry, so soon as the same takes place my whole estate, both real and personal, I give and bequeath to John and Sarah Dumey, a boy and girl living with me, to be equally divided among them:" *held*, that upon the marriage of the testator's widow the real estate devised passed to and vested in John and Sarah Dumey. *Ib.*
4. A will contained the following provision: "I give and bequeath unto my wife Sarah the whole of my estate, both personal and real, during her life or widowhood; but if my wife should again marry, so soon as the same takes place, my whole estate, both real and personal, I give and bequeath to John and Sarah Dumey, a boy and girl living with me, to be equally divided among them:" *held*, that the limitation over of the personal estate upon the second marriage was valid. *Dumey* v. *Sasse*, 117.
5. Although a wife should join with her husband in the execution of a mortgage, she is not a necessary party to a proceeding under the statute to foreclose the mortgage. *Thornton* v. *Pigg*, 250.

I

ILLEGAL CONSIDERATION.

See BETTING.

IMPROVEMENTS UPON PUBLIC LANDS.

See SALE.

INCLOSURE.

1. Where a *buffalo bull*, a wild, vicious and mischievous animal, breaks into a close, the owner of such close may kill him if this be necessary to preserve his property from destruction, although the close may not be fenced in the manner required by the act regulating inclosures. (R. C. 1845, p. 575.) *Canefox* v. *Crenshaw*, 199.

INDICTMENT.

See CRIMES AND PUNISHMENTS.

INFANCY.

See PRACTICE, 17.

1. A judgment against infant plaintiffs, appearing by attorney, may be recalled or set aside on motion of such plaintiffs, although at the date

INFANCY—(*Continued.*)

of the judgment one of such infant plaintiffs may have attained his majority. *Randalls* v. *Wilson*, 76.

2. The judgment being entire, must be recalled and set aside as to both plaintiffs. *Ib.*
3. After the judgment is recalled, the suit may be dismissed. *Ib.*
4. A father is not responsible for injuries caused by an assault made by his minor child. *Baker* v. *Haldeman*, 219.
5. An infant can not be a party plaintiff in a statutory proceeding for partition. *Johnson* v. *Noble*, 252.
6. A *qui tam* action, under section 8 of the act regulating marriages, for joining in marriage a minor without the consent of his parent or guardian, will only lie against him who celebrates the marriage. *Alsup* v. *Ross & Mitchell*, 283.
7. Where a minor executes a deed of conveyance of land, and after attaining majority conveys the same land to a third person, the second deed is a disaffirmance of the first. This is a question of law, and should not be submitted to a jury. *Peterson* v. *Laik*, 541.

INJUNCTION.

See EQUITY.

1. Although the courts will not interfere by injunction to restrain the sale of personal property levied upon and advertised for the payment of taxes illegally assessed; yet, it seems they will so interfere where it is sought to enjoin the sale of real property. (Dean v. Todd, 22 Mo. 91, explained.) *Lockwood* v. *City of St. Louis*, 20.
2. Section 25 of the act concerning mills and mill-dams (R. C. 1845, p. 743) was designed to afford a remedy only in cases in which a mill, or other machinery, or a dam erected in pursuance of said act, was injured by the subsequent erection of a dam or other obstruction, also erected under the provisions of said act. *Arnold* v. *Klepper*, 273.
3. Where it appears that the obstruction complained of was not erected under the provisions of said act concerning mills and mill-dams, the party aggrieved may seek redress by means of a suit for damages, or he may invoke the equitable interference of the courts by injunction; but before he can become entitled to the extraordinary relief afforded by an injunction, he must esablish his right to redress by a recovery in an action at law. *Ib.*

INSURANCE.

1. Where a steamboat, whose freight list is insured against a total loss only, meets with a disaster upon the contemplated voyage, and by a peril insured against is rendered totally unable to transport the cargo, and can not be repaired in a reasonable time to transport the same, this will amount to a total loss of the freight within the meaning of the policy; and that too although a *pro rata* freight should be received for the portion of the voyage completed at the time of the disaster. *Willard* v. *Millers' & Manufacturers' Ins. Co.*, 561.
2. In case of an insurance on freight "against a total loss only," to au-

INSURANCE—(*Continued.*)
thorize an abandonment the loss must be an actual total loss, not a constructive or technical total loss. *Ib.*

INTERPLEA.
See JUSTICES' COURTS, 1.

J

JUDGMENT.
1. A judgment against infant plaintiffs, appearing by attorney, may be recalled or set aside on motion of such plaintiffs, although at the date of the judgment one of such infant plaintiffs may have attained his majority. *Randalls* v. *Wilson*, 76.
2. The judgment being entire, must be recalled and set aside as to both plaintiffs. *Ib.*
3. After the judgment is recalled, the suit may be dismissed. *Ib.*
4. A judgment for damages in an action in the nature of an action of ejectment, although for a merely nominal sum, is a bar to a recovery, in a subsequent suit, of rents received prior to such judgment. *Stewart* v. *Dent*, 111.
5. A final judgment must be rendered in a cause before an appeal can be taken to the Supreme Court. *In the matter of the assignment of Thos. McGrade*, 125.

JUDICIAL NOTICE.
1. Judicial notice will be taken of the fact that the state of Missouri is east of the Rocky mountains. *Price* v. *Page & Bacon*, 65.

JURISDICTION.
See LAW COMMISSIONER'S COURT.

JUSTICES' COURTS.
See APPEAL, 1; CONSTABLE, 3.
1. An appeal will lie from the decision of a justice of the peace on an interplea concerning property or effects garnished by virtue of an execution. *Smith* v. *Sterritt*, 260.
2. The allowance by a justice of the peace of an appeal from a judgment by default raises no presumption that an application had been previously made by the party aggrieved to set aside the default. *Burns' Adm'r* v. *Hunton*, 337.
3. Where a judgment by default has been rendered by a justice of the peace, an appeal taken to a circuit court may properly be dismissed unless it appear that prior to the taking of the appeal an application had been made to the justice to set aside the default. *Burns* v. *Hunton*, 339.
4. The practice act of 1849 did not change the rules of practice regulating proceedings upon appeals from justices of the peace. *Coffman* v. *Harrison*, 524.
5. The technical rules of pleading should not be enforced in suits before justices of the peace; hence where the statement of the cause of ac-

JUSTICES' COURTS—(*Continued.*)

tion filed with the justice is in the following form: "1855. Feb. 20. L. & S. to P. J. C., *Dr.* To 41 hams, 464¼ lbs. at 10 cents, $46 45; to 2 b'ls. whisky, 77¼ gal's, at 28 cts., $21 70; total, $68 15;" *held*, that the cause of action was made good by proof that the articles enumerated, being the property of the plaintiff, P. J. C., had been wrongfully seized, at the instance of the defendants, L. & S., in an attachment suit against a third person. *Coughlan* v. *Lyons*, 533.

L

LABOR.

See MECHANICS' LIEN.

1. A laborer employed in the construction of a railroad by a sub-contractor is entitled to the benefit of the 12th section of the "Act to authorize the formation of railroad associations and to regulate the same," approved February 24, 1853. (Sess. Acts, 1853, p. 128.) *Peters* v. *St. Louis & Iron Mountain Railroad Co.*, 586.
2. It is not necessary that the thirty days' labor, for which a railroad company may be held liable under said act, should be performed upon thirty consecutive days. *Ib.*

LANDLORD AND TENANT.

See FORCIBLE ENTRY AND DETAINER, 1.

1. The condemnation and appropriation to public uses of a portion of leased premises will extinguish a proportionate part of the rent; and this proportionate part may be ascertained and fixed in an equitable proceeding instituted for that purpose by the tenant. *Kingsland* v. *Clark*, 24.

LANDS AND LAND TITLES.

1. A certificate of confirmation, granted by Recorder Hunt under the act of May 26, 1824, though *prima facie* evidence of title under the act of Congress of June 13, 1812, as against the government and persons claiming by title subsequent to the said act of June 13, 1812, is not sufficient to establish title to land lying within the approved United States survey of St. Louis common as against one claiming title under the city of St. Louis; there must in such case be actual proof of inhabitation, cultivation and possession prior to the 20th of December, 1803. *Vasquez* v. *Ewing*, 31.
2. The *opinion* of a surveyor as to the proper *location* of a concession or grant, is inadmissible in evidence to determine such location. *Blumenthal* v. *Roll*, 113.
3. Where there are two confirmations under the act of Congress of March 3, 1807, upon successive days, of the same tract of land to different claimants, the superiority of either title must be determined by the relative merits of the two titles as they stood before the confirmations. *Berthold* v. *McDonald*, 126.
4. A confirmation of a Spanish claim under the act of Congress of

LANDS AND LAND TITLES—(*Continued.*)

March 3, 1807, is not rendered void by reason of the fact that the person in whose name said claim was presented for confirmation, and to whom it was confirmed, had died previously to its presentation for confirmation; the confirmation will enure to the benefit of his legal representatives. *Ib.*

5. A survey of the out-boundary line of the town of St. Louis—the plat of which is commonly known as "Map X"—is not conclusive upon persons claiming title under confirmations by virtue of the first section of the act of Congress of June 13, 1812; the said act is operative to confirm to individuals common field lots, out-lots, &c., as well without as within the said out-boundary line as established by said survey. (Milburn v. Hortiz, and Tayon v. Hardman, 23 Mo. 532, 539, affirmed.) *Schoultz* v. *Lindell*, 567.

LAW COMMISSIONER.

1. The Law Commissioner's Court of St. Louis county can not, in case of appeal from a justice of the peace, where the justice fails to deliver a transcript, &c., affirm the judgment appealed from, upon the filing of a transcript by the appellee and a motion made by him for its affirmance. (Grassmuck v. Atwell, 23 Mo. 63, affirmed.) *Lala* v. *Canal Boat City of Joliet*, 23.
2. Where a suit is commenced before a justice of the peace to enforce a claim for work and labor against a contractor, also a lien against the building, and the suit as against the owner of the building is commenced out of time, and no judgment is rendered by the justice in regard to the enforcement of the lien; *held*, that the St. Louis Law Commissioner's Court has jurisdiction of an appeal taken in such case by the contractor from a judgment rendered against him by the justice. *Kinnear* v. *Jones*, 83.

LAYING OUT ROADS.

See ROADS.

LICENSE.

1. A license to sell liquor at a place named in a specified block in the city of St. Louis, will not authorize a sale in another block in said city. *State* v. *Hughes*, 147.
2. A license to sell spirituous liquors can not justify a sale made prior to its date. *Ib.*
3. A person may, since the act of March 12, 1849, (Sess. Acts, 1849, p. 54,) be indicted for selling intoxicating liquors, as a dram-shop keeper, without a license, in any quantity less than ten gallons. *The State* v. *Slate*, 530.
4. In an indictment under the act to license and tax merchants, (R. C. 1845, p. 737,) for dealing as a merchant without a license, it is not necessary to state the name of the person to whom, or the price for which, the merchandise was sold. *The State* v. *Miller*, 532.

LICENSE—(*Continued.*)

5. A person may be guilty, under the act to license auctioneers, (R. C. 1845, p. 162,) of exercising a trade or business of a public auctioneer without a license, although he may receive no compensation for the act of selling. *The State* v. *Rucker*, 557.

LIEN.

See BOATS AND VESSELS.

1. Where a steamboat has been seized under the act concerning boats and vessels, (R. C. 1845, p. 180,) and, upon the execution of a bond under the ninth section of said act with approved security, is discharged from further detention, the boat is entirely discharged from the lien; after such discharge of the boat, and after proceedings have been commenced in another court to enforce liens against the boat, the lien can not be revived by obtaining an order for further security, and to retake the boat until further security be given, and by the court's rescinding its approval of the bond; the demand would not in such case become entitled to be allowed and classed as a lien against the boat in such other proceedings. *Carson* v. *Steamboat Elephant*, 27.
2. Where work and labor are performed upon, or materials furnished for, the construction of bridges and culverts upon the line of a public railroad authorized by an act of the state legislature, no lien upon said bridges and culverts is conferred upon the material man or laborer by the act of February 24th, 1843, (Sess. Acts, 1843, p. 83,) "for the better security of mechanics and others erecting buildings, or furnishing materials for the same, in the city and county of St. Louis." *Dunn* v. *North Missouri Railroad Co.*, 493.

LEX LOCI.

See DAMAGES, 6.

LIMITATION.

See OUSTER.

M

MARES.

1. Mares are *cattle* within section 57 of article 3 of the act concerning Crimes and Punishments. (R. C. 1845, p. 364.) *The State* v. *Clifton*, 376.

MARKETABLE TITLES.

1. The doctrine of marketable titles is a purely equitable doctrine. *Kent & Obear* v. *Allen*, 98.

MARRIAGE.

1. A testamentary disposition by a husband, of either real or personal property, to his wife, to be void upon her marrying again, is not against public policy, but is a valid disposition under the law of this state. *Dumey* v. *Schoeffler*, 170.
2. A will contained the following provision: "I give and bequeath unto my wife Sarah the whole of my estate, both personal and real, during

MARRIAGE—(*Continued.*)

her life or widowhood; but if my wife should again marry, so soon as the same takes place my whole estate, both real and personal, I give and bequeath to John and Sarah Dumey, a boy and girl living with me, to be equally divided among them:" *held*, that upon the marriage of the testator's widow the real estate devised passed to and vested in John and Sarah Dumey. *Ib.*

3. A will contained the following provision: "I give and bequeath unto my wife Sarah the whole of my estate, both personal and real, during her life or widowhood; but if my wife should again marry, so soon as the same takes place, my whole estate, both real and personal, I give and bequeath to John and Sarah Dumey, a boy and girl living with me, to be equally divided among them:" *held*, that the limitation over of the personal estate upon the second marriage was valid. *Dumey* v. *Sasse*, 177.
4. Although a wife should join with her husband in the execution of a mortgage, she is not a necessary party to a proceeding under the statute to foreclose the mortgage. *Thornton* v. *Pigg*, 250.
6. A *qui tam* action, under section 8 of the act regulating marriages, for joining in marriage a minor without the consent of his parent or guardian, will only lie against him who celebrates the marriage. *Alsup* v. *Ross & Mitchell*, 283.

MASTER.

See SLAVE.

MECHANICS' LIEN.

See APPEALS, 1.

1. Where work and labor are performed upon, or materials furnished for, the construction of bridges and culverts upon the line of a public railroad authorized by an act of the state legislature, no lien upon said bridges and culverts is conferred upon the material man or laborer by the act of February 24th, 1843, (Sess. Acts, 1843, p. 83,) "for the better security of mechanics and others erecting buildings, or furnishing materials for the same, in the city and county of St. Louis." *Dunn* v. *North Missouri Railroad Co.*, 493.

MERCHANT.

See LICENSE, 4.

MILLS AND MILL-DAMS.

1. Section 25 of the act concerning mills and mill-dams (R. C. 1845, p. 743) was designed to afford a remedy only in cases in which a mill, or other machinery, or a dam erected in pursuance of said act, was injured by the subsequent erection of a dam or other obstruction, also erected under the provisions of said act. *Arnold* v. *Klepper*, 273.
2. Where it appears that the obstruction complained of was not erected under the provisions of said act concerning mills and mill-dams, the party aggrieved may seek redress by means of a suit for damages, or he may invoke the equitable interference of the courts by injunction;

MILLS AND MILL-DAMS—(*Continued.*)

but before he can become entitled to the extraordinary relief afforded by an injunction, he must establish his right to redress by a recovery in an action at law. *Ib.*

MORTGAGE.

1. An oral agreement to the effect that real estate, the title to which had been previously taken as a security, should stand as a security for further advances, is within the statute of frauds and consequently void. *Curle's Heirs* v. *Eddy*, 117.
2. Although a judgment at law may have been obtained by a mortgagee for the mortgage debt, he may also institute proceedings for a foreclosure of the mortgage and a sale of the mortgaged premises. *Thornton* v. *Pigg*, 249.
3. If a mortgagee obtain a judgment for his debt, and at an execution sale thereunder should become a purchaser of the mortgaged premises, he will hold them subject to redemption. *Ib.*
4. Although a wife should join with her husband in the execution of a mortgage, she is not a necessary party to a proceeding under the statute to foreclose the mortgage. *Ib.*
5. A judgment of foreclosure and that the mortgaged premises be sold, &c., obtained in a proceeding under the act concerning mortgages (R. C. 1845, p. 749), may be revived in the name of the administrator of the mortgagee against the administrator of the mortgagor; and that too, although this judgment of foreclosure was obtained by the mortgagee as trustee of a third person. *Riley's Adm'r* v. *McCord's Adm'r*, 265.
6. Although a petition for a foreclosure of a mortgage may be addressed to the judge "in chancery sitting," and the petitioner be styled "your orator," and it be prayed that "a writ of subpœna issue;" yet if, in accordance with the prayer of the petition, a judgment or decree is rendered that the equity of redemption be foreclosed *and the mortgaged premises sold*, &c., the proceeding will be regarded as a statutory proceeding. *Ib.*
7. After judgment of foreclosure of a mortgage, it is too late to urge against the revival of the judgment by *scire facias* that the mortgage was voluntary. *Ib.*
8. A mortgagee wrongfully disposed of the mortgaged premises; *held*, in a suit against him by the mortgagor, that the measure of damages was properly assumed to be the value of the premises sold at the time of the sale, the circumstances of the case not calling for the exercise of any rigor. *Wilson* v. *Drumrite*, 304.

MOTION FOR A REVIEW.

See PRACTICE, 23, 26.

MULTIFARIOUSNESS.

See PLEADING, 8; PRACTICE, 18.

N

NEGLIGENCE.
See CARE.

NEW TRIAL.
1. Where erroneous instructions are given, the Supreme Court will reverse the judgment of the lower courts without regard to the number of new trials previously awarded. (Harrison v. Cachelin, 23 Mo. 117, affirmed.) *Burns* v. *Hayden*, 215.

NOTICE.
See BILLS OF EXCHANGE AND PROMISSORY NOTES; SECURITY; FRAUD AND FRAUDULENT CONVEYANCES, 6.

O

OFFICIAL BOND.
1. In an action on an official bond against the principal and sureties, the admissions of the principal, made after the expiration of his term of office, are inadmissible in evidence against the sureties. *City of St. Louis* v. *Foster*, 141.

OUSTER.
1. Where one of several tenants in common is in possession of a tract of land, and a judgment for the possession of the tract is rendered against him in behalf of one claiming by title adverse to that of the co-tenants, and a writ for the delivery of possession is issued and placed in the hands of the proper officer; *held*, that this amounts to such an ouster as will terminate the co-tenancy in favor of the plaintiff in the execution, who, without an actual execution of the writ of possession, receives a deed from the defendant in the execution; he will not be estopped by accepting such a conveyance to deny the title of the co-tenants of his grantor; nor will the acceptance of such deed be such a recognition of a title, recited therein to have been acquired by the grantor, as will amount to an estoppel. *Vasquez* v. *Ewing*, 31.

OUT-BOUNDARY LINE OF TOWN OF ST. LOUIS.
See LANDS AND LAND TITLES.

P

PARENT.
1. A father is not responsible for injuries caused by an assault made by his minor child. *Baker* v. *Haldeman*, 219.

PARTIES.
See PLEADING.

PARTITION.
See DESCENTS AND DISTRIBUTIONS, 2.
1. An infant can not be a party plaintiff in a statutory proceeding for partition. *Johnson* v. *Noble*, 252.

PARTITION—(*Continued.*)

2. The act to provide for the partition of land, &c., (R. C. 1845, p. 764,) did not authorize the joinder of all the parties in interest as parties to the petition; there must be a party defendant as well as a party plaintiff, otherwise the proceeding will not be a suit for partition within said act, and being unauthorized will be null and void as a judicial proceeding. *Bompart* v. *Roderman*, 385.
3. Such a proceeding being unauthorized as a judicial proceeding, a partition made therein would not be rendered binding upon a married woman—one of the applicants for partition—by reason of the execution by her of an instrument in writing recommending the report of the commissioners to the approval of the court. *Ib.*
4. Although a partition so effected be followed up by possession in severalty of the allotments, a party to such proceeding will not thereby be estopped to go behind the partition and deny that other of said parties had title to the premises so partitioned. *Ib.*
5. Nor would such an estoppel be created by the fact that one of the parties to whom an allotment had been made conveyed the premises, so allotted, to a third person, describing them as the same allotted to the grantor in said partition proceeding. *Ib.*

PARTNERSHIP.

1. Where a bill is drawn by a partnership firm in favor of a creditor of such firm upon another firm, and is accepted in the name of the firm drawn upon by a partner thereof, who is also a member of the drawing firm, it can not be inferred from these facts alone that the purpose of the parties, or that the effect of the transaction is to subject the funds of the accepting firm to the payment of the debt: these facts alone appearing, a member of the firm drawn upon, although he may not be a member of the drawing firm and may not have assented to the acceptance, will not thereby be exonerated from liability on the acceptance. The acceptance *prima facie* is on partnership account. *Tutt* v. *Adams*, 186.
2. A bond executed by a partner, though executed in the name of the partnership and for a partnership debt, will not bind his co-partner. Such co-partner may however assent to the execution of such bond previously to its execution, or may ratify and adopt it afterwards; such assent or ratification and adoption may be by parol. *Gwinn* v. *Rooker*, 290.
3. A promissory note was executed in the following form: "Two years after date, I promise to pay to the order of Tevis, Sons & Co., $4000, for value received, with interest as per agreement from date. [Signed] Henry L. Tevis;" this note was assigned in the name of Tevis, Sons & Co. *Held*, in a suit by the assignee against the members of the firm of Tevis, Sons & Co., in which the defence relied on was that Henry L. Tevis, the maker of the note, was a member of the partnership firm of Tevis, Sons & Co., and had executed the note in question and endorsed it in the name of the firm for the purpose of raising

PARTNERSHIP—(*Continued.*)

money for his individual use; that it was erroneous to instruct the jury that "the form of the note sued on imports that Henry L. Tevis was the principal debtor, and that Tevis, Sons & Co. were his sureties." *Tevis* v. *Tevis*, 535.

4. Notice of the dishonor of a bill of exchange given to one member of a partnership firm is notice to all. *Bouldin* v. *Page & Bacon*, 594.

PENALTY.

See BOND.

PLEADING.

See EVIDENCE, 12; JUSTICES' COURTS, 5; CRIMES AND PUNISHMENTS.

1. The withdrawal of an answer, when a case is called for trial, is an admission of the traversable allegations of the petition. *Price* v. *Page & Bacon*, 65.
2. The heirs of an intestate can not be joined as parties plaintiff with the administrator in a suit for the recovery of damages for the breach of a contract to convey land to such intestate. *Brueggeman* v. *Jurgensen*, 87.
3. It is a matter within the discretion of the lower courts to permit leading questions to be put to witnesses. *The State* v. *Hughes*, 147.
4. Where the assignment of a bond or note is made upon a separate paper, the assignee may maintain an action upon the bond or note in his own name as the real party in interest. *Thornton* v. *Crowther*, 164.
5. Although a wife should join with her husband in the execution of a mortgage, she is not a necessary party to a proceeding under the statute to foreclose the mortgage. *Thornton* v. *Pigg*, 250.
6. An infant can not be a party plaintiff in a statutory proceeding for partition. *Johnson* v. *Noble*, 252.
7. Where minors institute suit by their father as natural guardian, and seek thereby to have a new trustee appointed in the place of one to whom certain slaves had been devised in trust for such minors on the ground of the failure to act; *held*, although it did not appear from the petition that the father had given bond as guardian, that a demurrer on the ground that no guardian had been appointed according to law was improperly sustained. *Temple* v. *Price*, 288.
8. Nor would such a petition be multifarious for the reason that, in addition to the appointment of a new trustee, it also prayed that certain of the parties defendant, who were charged therein with having wrongfully appropriated the hire and services of such slaves, might be ordered to account to the new trustee when appointed. *Ib.*
9. One of two joint defendants may plead by way of set-off a demand due him from the plaintiff. *Kent* v. *Rogers & Dillon*, 306.
10. Demands against a railroad company under section 12 of the act of February 24, 1853, (Sess. Acts, 1853, p. 128,) were assigned to an assignee in order that he might collect them either by suit in his own name or otherwise; for his services, he was to receive twenty-five per cent. of the amount collected, and the remainder he was to pay over

PLEADING—(*Continued.*)

to the assignors; to pay all costs and charges that might accrue in the collection of the claims or in their attempted collection. *Held*, that the assignee might sue for said claims in his own name. *Peters* v. *St. Louis and Iron Mountain Railroad Co.*, 586.

POLICY OF INSURANCE.

See INSURANCE, 1.

PRACTICE.

1. The Law Commissioner's Court of St. Louis county can not, in case of appeal from a justice of the peace, where the justice fails to deliver a transcript, &c., affirm the judgment appealed from, upon the filing of a transcript by the appellee and a motion made by him for its affirmance. (Grassmuck v. Atwell, 23 Mo. 63, affirmed.) *Lala* v. *Canal Boat City of Joliet*, 23.
2. Where a cause is set for trial, and the defendant by agreement of plaintiff is allowed until the day of trial to file his answer; *held*, that it is not erroneous to refuse to set aside a judgment by default against him for want of an answer, where the reason urged for setting aside the same is, that the defendant and his counsel were, during the day on which the case was set for trial, in attendance in another court, the one as witness, the other as counsel, in a cause there on trial. *Boernstein* v. *Hendrichs*, 26.
3. Where a cause by consent of parties is set for trial on a particular day in the return term, and the same is tried in the absence of the defendant and a judgment rendered against him; *held*, that he is precluded from insisting, in support of a motion to set aside the judgment rendered, that the cause was not triable of right at the return term. *Ib.*
4. Where a cause is upon the day of trial submitted to the court by plaintiff's counsel upon proofs presented by him, and the court finding for plaintiff gives judgment accordingly; *held*, that defendant is not entitled to have this judgment set aside for the reason that his counsel, at the time the case was called and submitted, was absent in attendance as counsel in another cause in another court. *Jacobs* v. *McLean*,
5. The Supreme Court will not in such case interfere with the discretion of the lower courts. *Ib.*
6. The St. Louis Criminal Court, in the case of an appeal from the city recorder, the cause being called for trial and the defendant not answering, on motion of the city attorney, affirmed the judgment; *held*, that the Supreme Court would not interfere with the discretion exercised by the Criminal Court in refusing to set aside the affirmance, the ground urged being that at the time the case was called the defendant was necessarily absent for a few moments. *City of St. Louis* v. *Murphy*, 41.
7. Where a cause is tried by the court without a jury, there should be a finding of the facts by the court. *Marmaduke* v. *McMasters*, 51.
8. The withdrawal of an answer, when a case is called for trial, is an ad-

PRACTICE—(*Continued.*)

mission of the traversable allegations of the petition. *Price* v. *Page & Bacon*, 65.

9. Where a party appealing from a justice of the peace to the St. Louis Land Court fails to pay the jury fee and file the transcript, the court may, upon the appellee's filing a transcript and paying the fee, affirm the judgment of the justice. *Harley* v. *McCauliff*, 85.
10. The Supreme Court will not interfere with the verdicts of juries on the ground that they are against the weight of evidence. *Zimmerman* v. *Owens*, 97.
11. A final judgment must be rendered in a cause before an appeal can be taken to the Supreme Court. *In the matter of the assignment of Thos. McGrade*, 125.
12. Amendments should be liberally allowed. *Clarkson* v. *Morrison's Administrator*, 134.
13. It is a matter within the discretion of the lower courts to permit leading questions to be put to witnesses. *The State* v. *Hughes*, 147.
14. The fact that the affidavit accompanying a petition for a change of venue may have been defective, will not render the order changing the venue a nullity; nor should the court to which the cause is transferred dismiss the suit for this defect. The objection should be made at the time the petition for a change of venue is acted upon. *Potter* v. *Adams' Executors*, 159.
15. Where erroneous instructions are given, the Supreme Court will reverse the judgment of the lower courts without regard to the number of new trials previously awarded. (Harrison v. Cachelin, 23 Mo. 117, affirmed.) *Burns* v. *Hayden*, 215.
16. A. instituted a suit against B. to recover money paid by him as a security for said B. upon a promissory note executed by them jointly. A. afterwards instituted a suit against C., charging in his petition that at the time of the execution of said promissory note C. was a secret partner of B. and praying that the two suits might be consolidated. C. answered denying the alleged partnership. The court consolidated the two suits against the objection of C. *Held*, 1st, that this consolidation was irregular; 2d, that depositions taken in the suit against B. alone, and of the taking of which C. had no notice, were inadmissible in evidence against C. *Peery* v. *Moore*, 285.
17. Where minors institute suit by their father as natural gnardian, and seek thereby to have a new trustee appointed in the place of one to whom certain slaves had been devised in trust for such minors on the ground of the failure to act; *held*, although it did not appear from the petition that the father had given bond as guardian, that a demurrer on the ground that no guardian had been appointed according to law was improperly sustained. *Temple* v. *Price*, 288.
18. Nor would such a petition be multifarious for the reason that, in addition to the appointment of a new trustee, it also prayed that certain of the parties defendant, who were charged therein with having wrong-

PRACTICE—(*Continued.*)

fully appropriated the hire and services of such slaves, might be ordered to account to the new trustee when appointed. *Ib.*

19. Where the plaintiff in a suit for slander fails to prove the words as charged, the court may, in allowing an amendment, require the plaintiff to pay all costs that have accrued since the commencement of the suit. *Street* v. *Bushnell*, 328.
20. Where a judgment by default has been rendered by a justice of the peace, an appeal taken to a circuit court may properly be dismissed unless it appear that prior to the taking of the appeal an application had been made to the justice to set aside the default. *Burns* v. *Hunton*, 339.
21. A finding of facts by a court, to authorize a judgment, must be a finding of the facts put in issue. *Allison* v. *Darton*, 343.
22. Judgment reversed because the evidence did not support or justify the finding of the facts by the court. *Pipkin* v. *Allen*, 520.
23. No motion for a review or a new trial is necessary where a court improperly refuses to hear any evidence at all in support of a demand against an intestate's estate. *Coots* v. *Morgan's Adm'r*, 522.
24. The practice act of 1849 did not change the rules of practice regulating proceedings upon appeals from justices of the peace. *Coffman* v. *Harrison*, 524.
25. A report of a referee, to whom a cause had been referred under article 16 of the practice act of 1849, upon the whole issue, must be reviewed in the same manner as if the cause had been tried by the court, and the court had made a finding of the facts. *Maguire* v. *McCaffrey*, 552.
26. Where it is apparent from the face of the report of a referee, to whom a cause had been referred under article 16 of the practice act of 1849, that the decision of the referee is erroneous, the judgment of the court confirming the report will be erroneous, and the party aggrieved will be entitled to a reversal thereof, although no motion for a review be filed within the time required by law. *Shore* v. *Coons*, 556.
27. A sheriff's return of process, regular on its face, is conclusive upon the parties to the suit; its truth can be controverted only in an action against the sheriff for a false return. *Hallowell* v. *Page*, 590; *Bouldin* v. *Page & Bacon*, 594; *Page* v. *Page & Bacon*, 595.
28. Should a defendant permit the time for answering to expire, it is not an unsound exercise of discretion to refuse to permit him to file an answer not showing a meritorious defence to the action. *Ib.*
29. A petition alleged that the plaintiff and defendant "jointly leased" certain premises of one A., and that the defendant collected the rents and failed to account to plaintiff for his share, one-half, of said rents. Upon the trial plaintiff offered in evidence a lease of said premises from a third person to said A. and an *assignment* by A. to plaintiff and defendant. *Held*, that this was a variance, and that the court might properly refuse to receive the *assignment* in evidence unless the plaintiff would amend his petition so as to correspond with the proof. *Deickman* v. *McCormick*, 596.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

See CRIMES AND PUNISHMENTS.

1. Where the circumstances of a homicide show *beyond all question* that it was committed by lying in wait, (it being assumed by the prosecution and by the accused that the only question for determination is, whether the accused committed the homicide,) it is not error to refrain from instructing the jury as to the law of murder in the first and second degrees. *The State* v. *Byrne*, 151.
2. Where after four several continuances granted to the same party, another application was made in his behalf on the ground of the absence of material witnesses, the accompanying affidavit stating generally that due diligence had been used to secure their attendance, and that one witness was sick and unable to attend, yet not showing in what the alleged diligence consisted; *held*, under the circumstances, that the application was properly refused. *The State* v. *Hays*, 369.
3. Although the failure of the foreman of a grand jury to certify under his hand an indictment to be a true bill is no cause for arrest of judgment after a trial and conviction, it is ground for quashing the indictment before trial. *The State* v. *Burgess*, 381.
4. Under the revised code of 1855, where two defendants, jointly indicted, elect to be tried together, they are not entitled to a panel of more than thirty-six jurors. *The State* v. *Phillips & Ross*, 475.
5. Under the revised code of 1855 (R. C. 1855, p. 1189), the trial of misdemeanors may be submitted to the court by the defendant and prosecuting attorney. *The State* v. *Moody*, 560.

PRESUMPTION.

See EVIDENCE, 18.

PRINCIPAL AND AGENT.

See AGREEMENT, 2.

1. Where one acting as a factor receives merchandise for shipment to a particular consignee, and makes advances upon the same, and the merchandise, being refused by the consignee by reason of its being in a damaged condition, is sold for less than the sum advanced; *held*, that the factor is entitled to have his advances made good. *Bull* v. *Sigerson*, 53.
2. Where the owner of land sends a real estate broker into market to dispose of it without any directions as to the title to be conveyed, he thereby gives assurance to the world that he has a valid title. *Kent & Obear* v. *Allen*, 98.
3. It is not sufficient to charge an owner of a slave for goods purchased and delivered to such slave, that the goods purchased were used by the slave for the benefit of the master with his assent. *Douglass* v. *Ritchie*, 177.
4. A due bill signed thus: "A., agent for B.," will bind A. if he had no authority to bind B. *Coffman* v. *Harrison*, 524.

PRINCIPAL AND SURETY.

See SECURITY; OFFICIAL BOND.

1. Where a note is given to secure money bet in this state on the election of a President of the United States, and a surety on said note, who knew at the time of signing the consideration for which it was given, is compelled by legal process in a foreign jurisdiction to pay the same: *held*, that he is not entitled to contribution from his principal. *Harley* v. *Stapleton's Adm'r*, 248.
2. The voluntary dismissal of an attachment suit, commenced by an endorsee of a promissory note at the request of a surety on said note against the principal, in which suit an amount of property more than sufficient to satisfy the debt was attached, will discharge the surety. *Bank of Missouri* v. *Matson*, 333.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC POLICY.

See MARRIAGE; RAILROADS, 1.

R

RAILROADS.

See AGREEMENT, 2.

1. Where work and labor are performed upon, or materials furnished for, the construction of bridges and culverts upon the line of a public railroad authorized by an act of the state legislature, no lien upon said bridges and culverts is conferred upon the material man or laborer by the act of February 24th, 1843, (Sess. Acts, 1843, p. 83,) "for the better security of mechanics and others erecting buildings, or furnishing materials for the same, in the city and county of St. Louis. *Dunn* v. *North Missouri Railroad Co.*, 493.
2. A laborer employed in the construction of a railroad by a sub-contractor is entitled to the benefit of the 12th section of the "Act to authorize the formation of railroad associations and to regulate the same," approved February 24, 1853. (Sess. Acts, 1853, p. 128.) *Peters* v. *St. Louis & Iron Mountain Railroad Co.*, 586.
3. It is not necessary that the thirty days' labor, for which a railroad company may be held liable under said act, should be performed upon thirty consecutive days. *Ib.*
4. Demands against a railroad company under section 12 of the act of February 24, 1853, (Sess. Acts, 1853, p. 128,) were assigned to an assignee in order that he might collect them either by suit in his own name or otherwise; for his services, he was to receive twenty-five per cent. of the amount collected, and the remainder he was to pay over to the assignors; he was to pay all costs and charges that might accrue in the collection of the claims or in their attempted collection. *Held*, that the assignee might sue for said claims in his own name. *Ib.*

RATIFICATION.
See PARTNERSHIP, 2.

REAL ESTATE BROKER.
See PRINCIPAL AND AGENT, 2.

REFEREE.
1. The report of a referee, to whom a cause had been referred under article 16 of the practice act of 1849, upon the whole issue, must be reviewed in the same manner as if the cause had been tried by the court, and the court had made a finding of the facts. *Magutre* v. *Caffrey*, 552.
2. Where it is apparent from the face of the report of a referee, to whom a cause had been referred under article 16 of the practice act of 1849, that the decision of the referee is erroneous, the judgment of the court confirming the report will be erroneous, and the party aggrieved will be entitled to a reversal thereof, although no motion for a review be filed within the time required by law. *Shore* v. *Coons*, 556.

RENT.
See LANDLORD AND TENANT; HUSBAND AND WIFE.
1. The condemnation and appropriation to public uses of a portion of leased premises will extinguish a proportionate part of the rent; and this proportionate part may be ascertained and fixed in an equitable proceeding instituted for that purpose by the tenant. *Kingsland* v. *Clark*, 24.

REQUISITION TO SUE.
See SECURITY.

RESTRAINT OF MARRIAGE.
See MARRIAGE.

ROADS.
1. The fact that the damages caused by laying out a road under the act of March 3, 1851, (Sess. Acts, 1851, p. 274,) may not have been assessed by the commissioners appointed under said act to locate said road, will not entitle the owner of the land through which said road passes to treat as trespassers those who, under the order of the county court and for the purpose of completing said road, enter and cut timber upon the line of the road as located. *Walker* v. *Likens*, 298.
2. *Quere*, whether an appeal will lie from the proceedings of the county court under the said act. *Ib.*

RETURN.
1. A sheriff's return of process, regular on its face, is conclusive upon the parties to the suit; its truth can be controverted only in an action against the sheriff for a false return. *Hallowell* v. *Page*, 590.

S

ST. LOUIS.
See CITY OF ST. LOUIS; MECHANICS' LIEN, 1; LANDS AND LAND TITLES, 1, 5.

SALE.

1. Where it appears that at the time of a sale of an improvement upon the public lands the vendor was out of possession, and that the land had been previously entered by a third person, the vendee in an action for the price may set up these facts as showing a want of consideration. *Burns* v. *Hayden*, 215.
2. If the vendor of a horse is aware, at the time of the sale, of the existence of a latent defect, unknown to the vendee, of such a character that the vendee would not have made the sale had he known of it, and such as would have ordinarily escaped the observation of men engaged in buying horses, and he allows the vendee to purchase without disclosing the defect, he is guilty of a fraudulent concealment, and must respond in damages to the vendee. *McAdams* v. *Cates*, 223.
3. Fraud in the consideration of a promissory note secured by a deed of trust, will not affect the title of one who purchases *bona fide* at a sale by the trustee under the deed of trust. *Mathews* v. *Lecompte*, 545.

SECURITY.

See PRINCIPAL AND SURETY; CONSTABLE.

1. A notice given to the holder of a promissory note, by one who had signed the same as a security, in the following form: "Sir—You are hereby notified that I will not stand good as security any longer on the note you hold against Wm. Upton and myself as security. [Signed] A. B."—is not a sufficient requisition to sue within the meaning of the act concerning securities. (R. C. 1845, p. 998.) *Lockridge* v. *Upton*, 184.
2. A notice given under the provisions of the revised code of 1845, (see R. C. 1845, p. 998, § 1,) by one who had executed a promissory note as a security to the person having the right of action thereon, to commence suit forthwith against the other parties to the note, naming them, is sufficient. *Christy's Adm'r* v. *Horne*, 242.
3. Although no notice may have been given to produce such instrument, evidence may be given of its contents. *Ib.*

SET-OFF.

1. One of two joint defendants may plead by way of set-off a demand due him from the plaintiff. *Kent* v. *Rogers & Dillon*, 306.

SEWER.

1. Church property in the city of St. Louis was liable, under the sewerage act of March 12, 1849, (Sess. Acts, 1849, p. 519,) to be assessed for the construction of sewers. *Lockwood* v. *City of St. Louis*, 20.

SHERIFF'S RETURN.

1. A sheriff's return of process, regular on its face, is conclusive upon the parties to the suit; its truth can be controverted only in an action against the sheriff for a false return. *Hallowell* v. *Page*, 590.

SLANDER.

See PRACTICE, 19.

SLAVES.

See CONVEYANCE, 1, 2; INDICTMENT, 7; GIFT, 2.

1. Where a slave is lost overboard and drowned in consequence of being, without the permission of his master, put to work "wooding" by the officers of a steamboat, upon which he was being transported, the steamboat will be liable for the loss. *Johnson's Adm'rs* v. *Steamboat Arabia*, 86.
2. It is not sufficient to charge an owner of a slave for goods purchased and delivered to such slave, that the goods purchased were used by the slave for the benefit of the master with his assent. *Douglass* v. *Ritchie*, 177.
3. The master of a steamboat will be liable, under section 31 of the act concerning slaves (R. C. 1845, p. 1018), for transporting a slave from one place to another in this state without the consent of the owner, although he may not be aware of the fact of such slave being on board the boat, unless he use proper care to guard against such an occurrence. *Withers* v. *Steamboat El Paso*, 204.
4. The degree of care required of the master in such case is not "the strictest diligence," but such care as thoughtful and prudent men engaged in affairs equally hazardous to their own rights of property would take in order to protect themselves from loss and injury. *Ib.*
5. The owner of a slave can not be rendered liable under section 35 of article 9 of the Act concerning Crimes and Punishments for the loss of a horse belonging to plaintiff, where the offence charged against the slave is the burning of the stable in which the horse happened to be at the time of the fire. *Stratton* v. *Harriman*, 324.
6. An indictment, under section 57 of article 3 of the act concerning Crimes and Punishments (R. C. 1845, p. 364), against a negro slave for maliciously killing a mare, must charge the act to have been done "feloniously." *The State* v. *Gilbert* (*a slave*), 380.

SPECIFIC PERFORMANCE.

1. There is no equity for specific performance of a contract to convey land where the party against whom such equity is asserted has rendered a specific execution on his part impossible by conveying said land to a third person. *Brueggeman* v. *Jurgensen*, 87.

SPIRITUOUS LIQUORS.

See LICENSE.

STATUTE OF FRAUDS.

1. An oral agreement to the effect that real estate, the title to which had been previously taken as a security, should stand as a security for further advances, is within the statute of frauds. *Curle's Heirs* v. *Eddy*, 117.

STRAYS.

1. Where the taker up of a mare as a stray acquires no right by such taking, he having no right under the stray law to take such mare up as a stray, a demand is not necessary to enable the owner to sue for her conversion. *Ray* v. *Davison*, 280.

SUB-CONTRACTOR.

See RAILROADS, 2.

SUBMISSION.

See ARBITRATION.

SUNDAY.

1. The city of St. Louis was empowered by its charter of March 3, 1851, to prohibit the keeping open of stores, shops, and other places of business on Sunday; those transgressing the provisions of the fourth section of article two of the ordinance concerning misdemeanors (Rev. Ordinances, 1853, p. 514) are amenable to the penalties prescribed by said ordinance. *City of St. Louis* v. *Cafferata*, 94.

SUPREME COURT.

See PRACTICE.

SURVEY.

See LANDS AND LAND TITLES, 5.

SURVEYOR.

1. The *opinion* of a surveyor as to the proper *location* of a concession or grant, is inadmissible in evidence to determine such location. *Blumenthal* v. *Roll*, 113.

T

TAX.

See ROADS, 1.

1. Church property in the city of St. Louis was liable, under the sewerage act of March 12, 1849, (Sess. Acts, 1849, p. 519,) to be assessed for the construction of sewers. *Lockwood* v. *City of St. Louis*, 20.

TENANT IN COMMON.

1. Where one of several tenants in common is in possession of a tract of land, and a judgment for the possession of the tract is rendered against him in behalf of one claiming by title adverse to that of the co-tenants, and a writ for the delivery of possession is issued and placed in the hands of the proper officer; *held*, that this amounts to such an ouster as will terminate the co-tenancy in favor of the plaintiff in the execution, who, without an actual execution of the writ of possession, receives a deed from the defendant in the execution; he will not be estopped by accepting such a conveyance to deny the title of the co-tenants of his grantor; nor will the acceptance of such deed be such a recognition of a title, recited therein to have been acquired by the grantor, as will amount to an estoppel. *Vasquez* v. *Ewing*, 31.
2. Where in an action in the nature of an action of ejectment the defendant in his answer denies the co-tenancy alleged by plaintiff, no stronger evidence of an ouster will be required of plaintiff than in a case where no co-tenancy exists. *Peterson* v. *Latk*, 541.

TOBACCO.

1. Tobacco, the growth of this state, is not one of the articles exempt from duty under the act to license auctioneers. (R. C. 1845, p. 161.) *The State* v. *Rucker*, 557.

TORT.

See TRESPASS.

1. Where a slave is lost overboard and drowned in consequence of being, without the permission of his master, put to work "wooding" by the officers of a steamboat, upon which he was being transported, the steamboat will be liable for the loss. *Johnson's Adm'rs* v. *Steamboat Arabia*, 86.
2. Where a *buffalo bull*, a wild, vicious and mischievous animal, breaks into a close, the owner of such close may kill him if this be necessary to preserve his property from destruction, although the close may not be fenced in the manner required by the act regulating inclosures. (R. C. 1845, p. 575.) *Canefox* v. *Crenshaw*, 199.
3. A father is not responsible for injuries caused by an assault made by his minor child. *Baker* v. *Haldeman*, 219.

TOTAL LOSS.

See INSURANCE.

TRESPASS.

See TORT; DAMAGES, 3.

1. A person who, building upon his own land, makes use of the wall of an adjoining proprietor, does not thereby render himself liable for one half the cost of such wall; if any injury has been sustained, the appropriate remedy is an action for damages resulting from such injury. *Abrahams* v. *Krautler*, 69.
2. The fact that the damages caused by laying out a road under the act of March 3, 1851, (Sess. Acts, 1851, p. 274,) may not have been assessed by the commissioners appointed under said act to locate said road, will not entitle the owner of the land through which said road passes to treat as trespassers those who, under the order of the county court and for the purpose of completing said road, enter and cut timber upon the line of the road as located. *Walker* v. *Litkens*, 298.

V

VARIANCE.

1. A petition alleged that the plaintiff and defendant "jointly leased" certain premises of one A., and that the defendant collected the rents and failed to account to plaintiff for his share, one-half, of said rents. Upon the trial plaintiff offered in evidence a lease of said premises for a third person to said A. and an *assignment* by A. to plaintiff and defendant. *Held*, that this was a variance, and that the court might properly refuse to receive the *assignment* in evidence unless the plaintiff would amend his petition so as to correspond with the proof. *Deickman* v. *McCormick*, 596.

VENDORS AND PURCHASERS.

See SALE.

W

WILL.

1. Where proceedings are instituted in a circuit court, under section 31 of the act concerning wills (R. C. 1845, p. 1083), to invalidate a will, and vacate the probate thereof; *held*, that the executor who obtained the probate of such will, and who, for aught that appears, is still acting under the will whose validity is contested, is estopped to move to dismiss such proceedings upon the alleged ground that the contested paper had never been lawfully established as the will of the testator, in that the judge before whom the will was proved had not power to take proof thereof in vacation. *Potter* v. *Adams' Exec'rs*, 159.
2. Proceedings under section 31 of the act concerning wills to invalidate a will, of which proof had been taken in vacation by the judge of the probate court of Green county, are not premature by reason of having been commenced before the court in term had confirmed such contested will. *Ib.*
3. A testamentary disposition by a husband, of either real or personal property, to his wife, to be void upon her marrying again, is not against public policy, but is a valid disposition under the law of this state. *Dumey* v. *Schoeffler*, 170.
4. A will contained the following provision: "I give and bequeath unto my wife, Sarah, the whole of my estate, both personal and real, during her life or widowhood; but if my wife should again marry, so soon as the same takes place my whole estate, both real and personal, I give and bequeath to John and Sarah Dumey, a boy and girl living with me, to be equally divided among them:" *held*, that upon the marriage of the testator's widow the real estate devised passed to and vested in John and Sarah Dumey. *Ib.*
5. A will contained the following provision: "I give and bequeath unto my wife Sarah the whole of my estate, both personal and real, during her life or widowhood; but if my wife should again marry, so soon as the same takes place, my whole estate, both real and personal, I give and bequeath to John and Sarah Dumey, a boy and girl living with me, to be equally divided among them:" *held*, that the limitation over of the personal estate upon the second marriage was valid. *Dumey* v. *Sasse*, 177.
6. Where it is sought to invalidate a will on the ground that the alleged testator was under undue influence, and was at the time of the signing the will of unsound mind by reason of intoxication, declarations made by him to the effect that he had never made the will—that if he had signed it they had got him drunk and made him do it, for he had no recollection of it—are inadmissible in evidence. *Gibson* v. *Gibson*, 227.
7. Depositions to prove a will rejected by a probate court may, in a proceeding to establish the will, instituted in the circuit court under sec-

WILL—(*Continued.*)

tion 31 of the act concerning wills, be taken under the general law concerning depositions. *Cawthorn* v. *Haynes*, 236.

8. Declarations, made by a testator at times before the date of the will that it is sought to invalidate, that the persons mentioned in the will as legatees "should never have any of his property," as also declarations made on divers occasions after such date, that "he had no will," alone and unsupported by other facts, do not furnish any legal evidence whatever of incapacity on the part of such testator, or of undue influence, and are inadmissible in evidence. *Ib.*

9. A will was executed in the following form: "I, A. B., of, &c., do. &c., make this my last will and testament in manner and form following, to-wit: first, that all my just and lawful debts be paid; second, that my wife, C. D., be my sole heir to all my estate remaining on hand after the payment of my just debts, real and personal, to-wit: lands, negroes, horses, cattle, hogs, sheep, farming utensils, household and kitchen furniture, money and effects. Given under my hand this day and date above written." *Held*, 1st, that the children of A. B. were *not named or provided for* in this will within section eleven of the act concerning wills (R. C. 1845, p. 1080); that consequently he died intestate as to such children; 2d, that evidence is not admissible to prove that at the time of making the will the testator declared, that he would name no other persons in his will—that he had done all for his children he intended to do—and that he designed all he had at his death to go to his wife absolutely. *Bradley* v. *Bradley*, 311.

10. A will, after a devise to the wife of the testator of eighty acres of land, proceeded as follows: "It is my will that at the death of my wife C. B., or at her marriage, or whenever she may as my widow voluntarily consent to it, that my land be sold, and that together all my other estate, to-wit, any amount arising from the sale of personal property, the proceeds of the sale of all my negroes that may belong to my estate, to-wit, the two men Joe and Isaac, and the children of Winney, if not amicably and equitably divided, shall be sold at the time my daughter Elizabeth shall become of age or to the age of twenty-one, as before mentioned, and shall be equally divided between my nine heirs now next named," &c. *Held*, upon an application for an order directing the executor to sell lands other than the eighty acres devised to the widow, and distribute the proceeds among the parties entitled, that the land could not be sold, the widow still living, except with her consent. *Bozarth* v. *Bozarth's Executor*, 320.

11. Section 38 of the act concerning wills (R. C. 1845, p. 1084,) renders the appointment of an executor void where he is also one of two attesting witnesses; consequently he is a competent witness to prove the will. *Murphy* v. *Murphy*, 526.

12. Although an appointment of an executor would be rendered void by reason of the fact that such appointee is also one of two attesting witnesses, he may be appointed administrator with the will annexed. *Ib.*

WITNESS.

See EVIDENCE.

1. Section 38 of the act concerning wills (R. C. 1845, p. 1084,) renders the appointment of an executor void where he is also one of two attesting witnesses; consequently he is a competent witness to prove the will. *Murphy* v. *Murphy*, 526.
2. Where a minor sues by his next friend, the next friend is a competent witness in behalf of such minor plaintiff. *Ib.*

WRIT.

See EXECUTION.

1. A sheriff's return of process, regular on its face, is conclusive upon the parties to the suit; its truth can be controverted only in an action against the sheriff for a false return. *Hallowell* v. *Page*, 590.